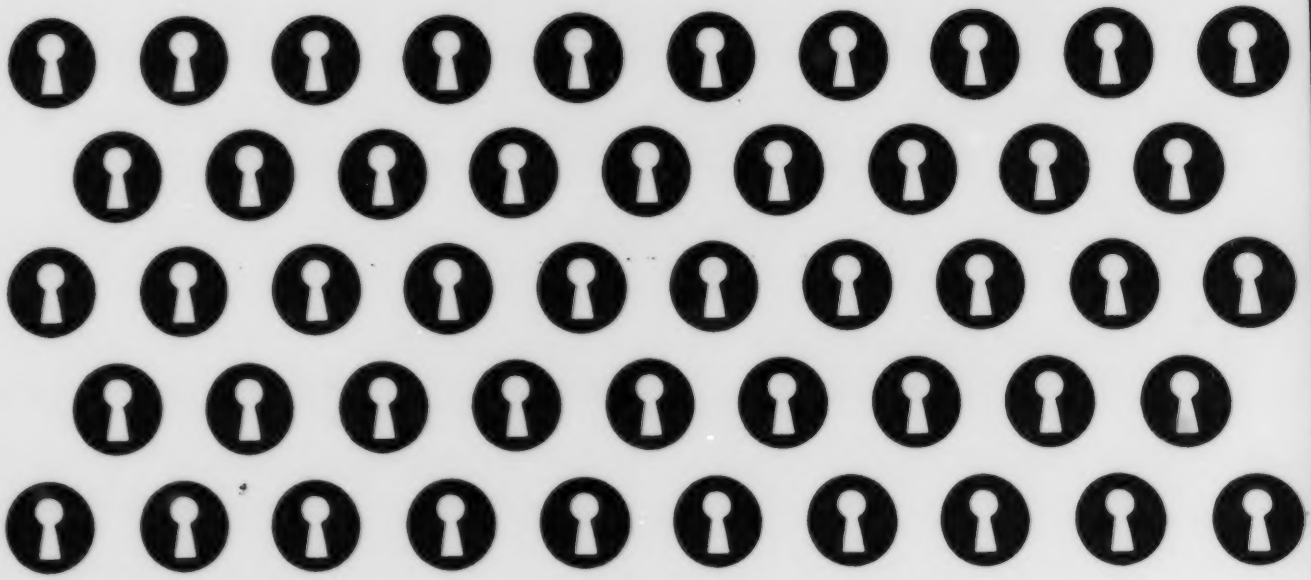
Ontario's
Access
And
Privacy
Legislation

AN ANNOTATION



Ontario

Management Board
Secretariat

ONTARIO'S ACCESS AND PRIVACY LEGISLATION

AN ANNOTATION

January 1, 1992

92-04292/

This publication is produced annually. Quarterly updates are also provided.

A French-language edition of this publication entitled *Legislation ontarienne sur l'accès a l'information et la protection de la vie privée - Notes Explicatives* is available from the Ontario Government Bookstore at the address below.

L'édition francaise de cette publication, initulée *Législation ontarienne sur l'accès a l'information et la protection de la vie privée - Notes Explicatives* est disponible à la Librairie du government de l'Ontario à l'adresse indiquée ci-dessous.

ISBN 0-7729-9120-0

Copies of this publication are available from:

Publications Ontario
880 Bay Street
Toronto, Ontario
M7A 1N8
(416) 326-5320

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HOW TO USE THE ANNOTATION

THE **ANNOTATION** IS PUBLISHED TO ASSIST IN INTERPRETING THE PROVINCIAL AND MUNICIPAL ACCESS AND PRIVACY LEGISLATION. IT IS PREPARED BY THE FREEDOM OF INFORMATION AND PRIVACY BRANCH OF THE MANAGEMENT BOARD SECRETARIAT.

The **Annotation** contains the Freedom of Information and Privacy Branch's highlights of the Information and Privacy Commissioner's Orders made under the :

- Freedom of Information and Protection of Privacy Act (FIPPA), and
- Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).

These highlights and references to the Order numbers, are integrated with the relevant sections of the two Acts. Since the proclamation of the MFIPPA, municipal Orders are prefaced by the letter "M", while Orders made under the FIPPA are prefaced by the letter "P".

This **Annotation** contains the most recent (i. e., R.S.O. 1990) version of the legislation. It also contains highlights of all the Orders made by the Information and Privacy Commissioner up to January 1, 1992 (up to and including Order P-261 and M-6).

A Concordance of Section Numbers between both Acts is also provided. This is especially important since Orders listed under the relevant section of one Act may pertain to a similar section in the other legislation. For example, decisions with respect to the Third Party Information exemption would be listed under section 17 of the FIPPA and section 10 of the MFIPPA. Therefore, it is important to consult the Concordance of Section Numbers in order to refer to the appropriate section in both Acts.

A new feature of this **Annotation** is the Records Index. The Records Index contains an alphabetical listing of the types of documents which have been considered by the Commissioner, together with the respective Order numbers.

The highlights in the **Annotation** represent the Freedom of Information and Privacy Branch's interpretations of the Orders made by the Information and Privacy Commission, Ontario. Where greater clarity is needed, reference should be made to the original Order.

QUESTIONS OR COMMENTS REGARDING THE ANNOTATION SHOULD BE DIRECTED TO:

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CONCORDANCE OF SECTION NUMBERS

This Table of Concordance cross references comparable sections in Ontario's *Freedom of Information and Protection of Privacy Act*, with the *Municipal Freedom of Information and Protection of Privacy Act*. The wording of subsections is not always identical.

Provincial Act	Municipal Act
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1(b)	1(b)
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The Freedom of Information

and

Protection of Privacy Act

R.S.O. 1990, Ch. F.31
and
Ontario Regulations 15/89 and 516/90

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SECTIONS

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. 1987, c.25, s.1.

Definitions

2. (1) In this Act,

"head", in respect of an institution, means,

(a) in the case of a ministry, the minister of the Crown who presides over the ministry, and

(b) in the case of any other institution, the person designated as head of that institution in the regulations; ("personne responsable")

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner appointed under subsection 4(1); ("commissaire à l'information et à la protection de la vie privée commissaire")

"institution" means,

(a) a ministry of the Government of Ontario,

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex , sexual orientation or marital or family status of the individual.

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence.

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual.

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act; ("règlements")

"responsible minister" means the minister of the Crown who is designated by order of the Lieutenant Governor in Council under section 3. ("ministre responsible"), 1987, c.25, s.2(1); 1989, c.64 s.3(1,2).

Personal Information

2. (2) Personal information does not include information about an individual who has been dead for more than thirty years.1987, c.25, s.2(2).

S.2(1)

Institution

- The Mines and Lands Commission is not a Ministry of the Government of Ontario. It is independent of the Ministry of Natural Resources and exercises administrative and quasi-judicial functions. Any appeals of its decisions lie to the courts and not the Minister. As it is not covered by regulation, and it is not a Ministry, it is not an "institution" as defined in s.2(1). **(Order #P-231)**

Law Enforcement

Clause (b)

- Investigations by the Human Rights Commission into complaints under the Ontario Human Rights Code are "law enforcement matters". **(Orders #89, 178, 200, 208, P-221, P-242, P-253, P-258)**

- Investigations in respect of enforcement of the Employment Standards Act are "law enforcement". **(Order #94)**

- Investigations in respect of the enforcement of the Apprenticeship and Tradesmen's Qualifications Act are "law enforcement". **(Orders #136, 137)**

- The investigation of an Eligibility Review Officer regarding the requester's right to certain social welfare benefits could lead to a sanction such as an assessment of overpayment or the withholding of benefits. It is therefore a law enforcement matter. **(Order #139)**

- An internal investigation into program administration within a correctional facility is not "law enforcement". **(Order #98)**

- The term "policing" is not broad enough to include an internal investigation in respect of breach of contract by an employee. Regarding the second part (b) of the definition, investigations by an employer to determine whether there is cause to terminate an employee are not included. Grievance proceedings at the instance of the employee are not what is contemplated by this section. The investigation or inspection must be conducted with a view to providing a court or tribunal with facts by which it would make a determination of a party's rights. **(Orders #157, 170, 182, 192)**

- The term "law enforcement" does not extend to disciplinary matters in general. It involves the investigation of conduct that may be "unlawful"; that is, a violation of a statute or regulation. However, a disciplinary investigation for certain matters such as theft could be in the nature of law enforcement. The pivotal factor is whether the investigation could lead to a proceeding before a court at the instance of the institution, and not the employee. **(Orders #170, 165)**

- Records do not fall within the definition of "law enforcement" where they are created by the institution's personnel in their capacity as human resources and staff relations specialists conducting an investigation re: sexual harassment; nor are the investigations carried out on behalf of the Ontario Human Rights Commission. **(Order #182)**

Personal Information

(see also s. 2(2) which states that "personal information" does not include information about an individual dead for more than 30 years.)

Including

- The definition of "personal information" is not exhaustive. It may also include personal information not reflected in clauses 2(1)(a) to (h) of the definition. **(Orders #11, 97)**

Individual

- The reference to "individual" in the definition of "personal information" is a reference to a natural person, i.e. not to a corporation, partnership, sole proprietorship or trade union. **(Orders #16, 53, 113)**

- It is possible that in some circumstances information about a business entity could only relate to an identifiable individual. In these circumstances, it would be personal information. **(Order #113)**

- A name of an individual, when that individual is communicating on behalf of a corporation, is corporate rather than personal information. **(Orders #80, 113, P-257)**

- A municipal street address and the property's estimated market value is not information about an identifiable individual, and is therefore not "personal information". **(Orders #23, P-239)**

- The names of individuals who have died within the past 30 years, and whose estates have defaulted to the Crown, are "personal information". **(Order #71)**

- Letters containing the addresses of the writers, information about them and their personal opinions are "personal information". **(Orders #113, 139)**

- A note to a Crown Attorney containing the names of those accused and Crown witnesses is "personal information". **(Order #39)**

- Current salary information alone, without information respecting identity, does not fall within the definition of "personal information"; however, where only one individual holds a position and there is a record of that person's salary, that record is "personal information" because it is recorded information about an identifiable individual. **(Order #61)**

- An investigation report into expense account irregularities by an employee of an institution contains "personal information" **(Order #P-256)**

- Where names of employees or officials who are responsible for drafting reports are noted in the reports, their names appear as representatives of their employer. In instances where the employer is an institution or a corporate entity, the names are not "personal information". **(Order #P-257)**

Recorded

- Oral comments which have not been recorded do not come within the definition of "personal information". **(Orders #17, 19, 99, 196)**

Job Competition and Related Records

- Ratings and test results in a job competition are the "personal information" of the competitors. **(Orders #20, 196)**

- A selection committee's notes in respect of a job interview are "personal information" about the competitors. **(Order #97)**

- Test results obtained during a job competition which identify the individual who took the test are "personal information". **(Order #43)**

Clauses (e) and (g)

- Statements containing the allegations of individuals who have complained about the behavior of the requester are "personal information" of the requester and of the individuals who made the statements. **(Orders #37, 46, 121)**

- Written job performance evaluations about the requester are the personal information of the requester and not the authors. **(Orders #194, P-240)**

- An individual's opinions relating to public events are "personal information". **(Order #66)**

- An OPP report in respect of the investigation of several police officers contains personal information about those officers. **(Order # P-237)**

- Where an employee has a duty as part of his or her job function to provide an opinion about another individual, the resulting record would not contain personal information about the employee providing the opinion. Where the opinion contains information about other individuals it may be "personal information" about those other individuals. **(Order # P-257)**

Clause (f)

- Submissions made by the executive director of an agency of the institution, on the letterhead of the agency and approved by the board of the agency are not the personal views or opinions of an "individual". **(Order #78)**

Clause (h)

- Information that an identifiable individual is making a request under the Freedom of Information and Protection of Privacy Act is "personal information". **(Orders #27, P-216)**

- Names of lottery winners are "personal information". **(Orders #180, 181)**

- An individual's name is "personal information" where its disclosure would reveal that a particular person reviewed a particular drug product as a consultant for the Ministry of Health. **(Order # P-235)**

Record

- The duty of the institution differs depending on what part of the definition the request is referable. If the request is for information that currently exists in a different recorded format, the institution must advise the requester of the related records. Subject to the special provisions dealing with machine readable records, an institution is not

obliged to create a record in response to a request. Although the creation of a record is not generally required, it may, in certain circumstances be in keeping with the spirit and purpose of the Act to do so. (**Orders #17, 19, 50, 99, 196, P-231**)

- Notes kept by a court reporter during a hearing were a "record" even though no transcript had been produced. (**Order #52**)

s.2(2)

- The protection of s.21 extends to a deceased person's personal information for a 30 year period from the date of his or her death, if the release of personal information constitutes an unjustified invasion of personal privacy. (**Order #71**)

PART 1

ADMINISTRATION

Responsible minister

3. The Lieutenant Governor in Council may by order designate a minister of the Crown to be the responsible minister for the purposes of this Act. 1987, c. 25, s. 3.

Information and Privacy Commissioner

4. (1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this or any other Act. 1987, c.25, s.4(1); 1989, c.64, s.3(4).

Appointment

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly.

Term and removal from office

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly. 1987, c.25, s.4(2,3).

Assistant Commissioners

(4) The Commissioner shall appoint one or two officers of his or her staff to be Assistant Commissioners. 1989, c.64, s.3(5)

Nature of employment

5. (1) The Commissioner shall work exclusively as Commissioner and shall not hold any other office under the Crown or engage in any other employment.

(2) The *Public Service Act* and the *Public Service Pension Act* do not apply to the Commissioner. 1987, c.25, s.5.

Salary

6. (1) The Commissioner shall be paid a salary to be fixed by the Lieutenant Governor in Council.

Idem

(2) The salary of the Commissioner shall not be reduced except on the address of the Assembly.

Expenses

(3) The Commissioner is entitled to be paid reasonable traveling and living expenses while absent from his or her ordinary place of residence in the exercise of any functions under this Act.

Pension

(4) Part II of the *Legislative Assembly Retirement Allowances Act*, except sections 15 and 16 and subsection 18(5), applies with necessary modifications to the Commissioner in the same manner as if the Commissioner were a member of the Legislative Assembly and for the purpose,

"average annual remuneration" means the average annual salary of the Commissioner during any five years of his or her service, which years need not be consecutive, during which his or her salary was highest; ("rémunération annuelle moyenne")

"remuneration" means the salary of the Commissioner. ("rémunération") 1987, c. 25, s. 6

Temporary Commissioner

7. If, while the Legislature is not in session, the Commissioner dies, resigns or is unable or neglects to perform the functions of the office of the Commissioner, the Lieutenant Governor in Council may appoint a Temporary Commissioner to hold office for a term of not more than six months who shall, while in such office, have the powers and duties of the Commissioner and shall be paid such salary or other remuneration and expenses as the Lieutenant Governor in Council may fix. 1987, c.25, s.7.

Staff

8. (1) Subject to the approval of the Lieutenant Governor in Council, the Commissioner may employ mediators and any other officers and employees the Commissioner considers necessary for the efficient operation of the office and may determine their salary and remuneration and terms and conditions of employment.

Benefits

(2) The employee benefits applicable from time to time to the public servants of Ontario with respect to,

(a) cumulative vacation and sick leave credits for regular attendance and payments in respect of such credits;

(b) plans for group life insurance, medical-surgical insurance or long term income protection; and

(c) the granting of leave of absence,

apply to the employees of the Commissioner and where such benefits are provided for in regulations made under the *Public Service Act*, the Commissioner, or any person authorized in writing by him or her, may exercise the powers and duties of a minister or deputy minister or of the Civil Service Commission under such regulations. 1987, c.25, s.8(1,2)

Public Service Pension Plan

(3) The Commissioner shall be deemed to have been designated by the Lieutenant Governor in Council under the Public Service Act as a commission whose permanent and probationary staff are required to be members of the Public Service Pension Plan. 1987, c.25, s.8(3), revised.

Premises and supplies

9. (1) The Commissioner may lease any premises and acquire any equipment and supplies necessary for the efficient operation of the office of the Commissioner.

(2) The accounts and financial transactions of the office of the Commissioner shall be audited annually by the Provincial Auditor. 1987, c. 25, s. 9(3).

PART II

FREEDOM OF INFORMATION ACCESS TO RECORDS

Right of access
10. (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
Severability of record
(2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1987, c. 25, s. 10.

s. 10(1) - Custody or Control

- A report submitted to an institution from a third party for funding is in the "custody or control" of an institution. **(Order #3)**

- Only one part of the test needs be met; that is, custody or control. Even where the institution maintains copies of a record produced in whole or in part by another organization, such records are in the custody of the institution. Where the contract between the institution and third party states that the reports belong to the institution, control lies with the institution. **(Orders #41, P-257)**

- An institution does not have custody of a court reporter's notes where the notes are not delivered to the institution or to the reporter's employer. In order to establish control of a court reporter's notes, the institution's procedures must be considered. If any member of the public can gain access to the notes, then the institution does not have control. If the institution must approve production or distribution of notes, then the institution has control. In order to determine the issue, one can look to relevant legislation, contracts or practices. **(Orders #52, 119)**

- **Order #120** provides a list of factors that may be utilized to determine whether an institution has custody or control of a record. Considerations such as whether the record relates to a legitimate business function of the institution, and whether the institution has the authority to regulate the use and disposal of the record are significant. The term "custody" and "control" should be given a broad interpretation and only in rare circumstances would physical possession not suffice as "custody". **(Order # P-257)**

- Bare possession is not sufficient to base a finding that the record is in the "custody" of the institution; there must be some right to deal with

the records and some responsibility for their care and protection. (Order #P-239)

- Even where a record in the custody or control of an institution contains one sentence referable to a federal Crown Corporation, that part of the record is still subject to the Act. (Order #P-241)

- Day Nursery Health Inspection Reports were in the custody of the Ministry of Community and Social Services where the institution was required to receive them under the Day Nurseries Act. (Order #P-257)

s. 10(1) - Record

- While there is, generally, no duty to "create" a record in response to a requester, creation of a record is sometimes consistent with the spirit of the Act, and enhances the purpose of the Act in respect of access. The Commissioner, however, has no power to order the institution to create a record when no record exists. (Order #99)

s. 10(2) - Severance

- Severance of the record should prevent the disclosure of information which is exempted. (Order #14)

- The head cannot rely on exemptions without first considering whether parts of the record could be disclosed without revealing exempted material. The key issue is reasonableness. A valid severance provides the requester with information responsive to the request. (Orders #22, 24, 30, 40, 48, 49, 56, 57, 72, 92, 123, 124, 134, 150, 180, 187)

- This subsection applies to the law enforcement exemption even though s. 10(2) refers to the content of a record, while s. 14(2)(a) exempts a class of record - a "report". If all of the record is a "report" and is determined to be within s. 14(2)(a), it may be exempt in its entirety. (Orders #30, 38, 94, 124, 134, 137, 200, P-221, P-239, P-250)

- Personal information which is subject to the mandatory exemption provisions and the presumption regarding "unjustified invasion of personal privacy" cannot reasonably be severed. (Order #20)

- Proper severance results in a record which no longer meets the requirements of the exemption. In respect of a job competition, the typing and shorthand test, without personal identifiers, should be disclosed. The test for severance regarding s. 21 exemptions should be whether the severed record falls under the s. 2(1) definition of "personal information". (Orders #43, 64)

- In this instance, curricula vitae could not be severed without disclosing the exempt personal information. (Order #159)

- In this instance, personal information about the requester was so interwoven with the personal information of other individuals that a reasonable severance was not possible. (Order #196)

- Nothing in the Act permits an institution to sever out information in a record because the requester already knows that information. (Order #210)

Obligation to disclose
11. (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environment, health or safety hazard to the public.
Notice
(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so.
Contents of notice
(3) The notice shall contain,
(a) a statement that the head intends to release a record or a part of a record that may affect the interest of the person;
(b) a description of the contents of the record or part that relate to the person; and
(c) a statement that if the person makes representations forthwith to the head as to why the record or part thereof should not be disclosed, those representations will be considered by the head.
Representations
(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed. 1987, c. 25, s. 11.

- These duties and responsibilities belong to the head alone. Therefore, submissions on an appeal as to the applicability of this section cannot be delegated. (Orders #65, 187)

- This section cannot be used to require the disclosure of drug quality advisory body minutes. (Order #68)

12. (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,
(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or (b) the Executive Council for which, or in respect of which, the record has been prepared consents of access being given. 1987, c.25, s. 12

General

- The introductory words of s. 12 (1) provide broader criteria than s. 12(1) (a) to (f). Therefore, if a record does not fall within s. 12(1) (a) to (f) it may still fall within the introductory words of s.12(1). (**Orders #22, 40, 56, 72, 73, 131, 147, 205, 206, P-226**)

- The exemption is applicable to records associated with the normal Cabinet decision-making process. (**Order #80**)

- Reports that had been reviewed by ministers and were incorporated into submissions made at Cabinet committees and to Cabinet would permit the drawing of accurate inferences regarding the substance of deliberations of the Executive Council or its committees. The reports are therefore exempt. (**Order #P-226**)

s.12(1)

- The term "substance" means the essential aspect or most important part of the deliberations. (**Orders #72, 167**)

- The term "deliberation" means the process of deliberating regarding a contemplated act. (**Orders #72, 167**)

- It would be rare and exceptional to include a record which had never been placed before the Executive Council or its committees. (**Orders #72, 73, 147, 167**)

- If the record was created as a direct result of a Cabinet committee's request for the specific information contained in the report, it would fall within this subsection. (**Orders #72, 206**)

- The institution must provide objective evidence to establish that the records went before Cabinet or its committees or that they were incorporated into a Cabinet Submission or used as a basis for developing a Cabinet Submission. (**Order #167**)

s. 12(1)(a)

- This exemption does not extend to the individual ministerial level. The record must have been reflective of the deliberations or decisions of the Executive Council or its Committees. **(Order #131)**

s. 12(1)(b)

- s. 12(1) does not include records containing numerical data in columns, matrices and calculations. **(Order #60)**

- s. 12(1)(b) does not include findings or recommendations in a report referred to briefly in an executive summary which led to the creation of another record prepared for submission to Cabinet. **(Order #73)**

- To come within s. 12(1)(b), there must be evidence that the record went before Cabinet or its Committees or that it was incorporated into a Cabinet Submission or used as a basis for developing a Cabinet Submission. **(Orders #147, 206)**

s.12(1)(c)

- s.12(1) (c) does not apply once the Government has made the records in question public by disclosure in the Budget Speech and by a ministerial announcement that a decision has been made and implemented. **(Orders #60, 206)**

- In order for the exemption to apply, a briefing note that contains background analyses must also have been submitted or prepared for submission to the Executive Council or its committees for their consideration. **(Order #188)**

s.12(1)(d)

- Exempts letters from a minister to the Attorney General. **(Order #56)**

- **Order #134** is an example of this exemption.

- Intended use or intended consultations among ministers of the Crown is not sufficient for reliance on s.12(1)(d). **(Order #206)**

s.12(1)(e)

- Exempts the issues sheet prepared for a minister. **(Order #56)**

- s. 12(1)(e) does not include records already presented to and dealt with by the Executive Council or its committees. **(Orders #22, 60, 167)**

- For this exemption to apply, it is necessary that the record itself be prepared to brief a minister. A record which consists only of a series of

one-line references to the titles of issue sheets which themselves were prepared to brief the minister does not fall within the exemption in s. 12(1)(e). **(Orders #131, 167, 206)**

- In order for this exemption to succeed, there must be evidence that all aspects of s.12(1)(e) have been satisfied. **(Order #167)**

s.12(2)(b)

- s. 12(2)(b) does not impose a requirement on the head to seek consent of Cabinet in all cases. The head must direct his or her mind to whether consent should be sought. **(Orders #22, 24, 40, 72, 154, 160)**

- The institution must establish by evidence that the head had considered the possibility of seeking the consent of the Executive Council for the release of the records. **(Order #72)**

Advice to government
13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.
Exemption
(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
(a) factual material;
(b) a statistical survey;
(c) a report by a valuator, whether or not the valuator is an officer of the institution;
(d) an environmental impact statement or similar record;
(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
(h) a report containing the results of field research undertaken before the formulation of a policy proposal;
(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is to be submitted to the Executive Council or its committees;
(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power

conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

Idem

(3) Despite subsection (1), head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. 1987, c. 25, s. 13.

s.13(1)

- s. 13(1) includes internal memos addressed to other government staff and notes prepared by a public servant. **(Orders #24, 48)**

- s.13(1) does not include a record which merely identifies a policy. **(Order #56)**

- The head must consider s.13(2) before exercising his or her discretion in respect of s.13(1). **(Orders # 56, 92).**

- s. 13(1) is limited to records created by Ontario public servants. It may be that the exemption would include records created by public servants who are not employed by an institution (such as the Ombudsman's office). **(Orders #56, 170** (at page 23))

- s. 13(1) may not include a ministerial transmittal slip with references to the fact that advice was given where the advice is not appended, or where the particular record containing the advice is not specifically referred to. A telephone message slip is not included where only the topic of the conversation is noted. "Advice" must include communication from one person to another. Therefore, a memo to yourself or a "workplan" which is not communicated to another person is not advice. However, records which identify policy options or models, though not addressed to a particular individual, are exempt where they are clearly prepared by public servants to provide advice to senior-level decision-makers. **(Orders #58, 92, 94, 128)**

- It is not possible to protect public information from disclosure under subsection 13(1). For example, a Provincial Auditor's report would be disclosed. **(Order #48)**

- The advice and recommendations of a drug advisory body created to assist a minister are included in s.13(1). "Advice and recommendations" includes records of discussions, comments and recommendations by the advisory body. **(Orders #68, 128)**

- s. 13(1) includes the "response" sections of the minister's issue notes. These contain advice from a public servant to the minister as to how to respond. As well, draft letters for the minister's signature are "advice".**(Orders #92, 188)**

- **The "topic" and "background" sections of the briefing response (minister's issue notes) do not contain advice and recommendations. (Order #188)**

- **s. 13(1) is not intended to exempt all communications between public servants even if they can be seen broadly as advice or recommendations. The exemption protects the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making. (Orders #94, 118, 135, 141, 142, 147, 160, 163, 165, 167, 168, 201, 204, 206, 210, P-211, P-248)**

- **"Advice" must contain more than mere information. It pertains to the submission of a suggested course of action which will ultimately be accepted or rejected during the deliberative process. (Orders #118, 135, 142, 160, 163, 167, 204, 206, 210, P-211, P-233, P-248)**

- **The investigator's advice and recommendations regarding whether a sexual harassment investigation should proceed to the follow-up stage are exempt under s.13(1). The findings of the investigators, however, are not "advice or recommendations" under s. 13(1). (Order #165)**

- **A record disclosing "concerns" of a civil servant do not constitute "advice or recommendations". The reference to a "concern" does not suggest a course of action which can be accepted or rejected during the deliberative process. (Order #160)**

- **Where the opinion or factual material would not reveal a recommended course of action, it is not exempt under s. 13(1). (Order #164).**

- **An account of advice, which the writer of the memorandum had previously received from investigating officers, is exempt under s. 13 (1). (Order #170)**

- **Advice from counsel may be exempt under s. 13(1) (e.g.: legal analysis, assessment of facts). (Order #170)**

- **Discussions in records which state that it "may be of interest to ..." is not advice or recommendations, but "mere reportage". There is no specific course of action offered for deliberation leading to a decision. (Order #201)**

- **An employee's review of a tribunal's decision to determine whether it qualifies in law for appeal is not advice. This is factual information as to why an appeal should be considered. (Order #201)**

- The disclosure of the name of the public servant would not amount to disclosure of "advice or recommendations;" s. 13 (1) does not in effect create an anonymous public service. **(Order #172)**

- A record which contains recommendations as to technical specifications necessary to build a scoreboard is not subject to s. 13(1). The disclosure of such a record would not reasonably be expected to inhibit the free flow of information to decision makers. **(Order #204)**

- A record of a public servant that seeks advice is not exempt. As well, a record that refers to two options without outlining the options is not exempt. **(Order #P-233)**

- A record may be exempted under s.13 if it would reveal advice or recommendations by inference even though it is not itself advisory in nature. **(Order #P-233)**

s.13(2)

- s.13(2) must be considered before a decision is made in respect of the discretion to release under s.13(1). The Commissioner can order the head to do this where there is no evidence it was done. **(Order #92)**

- s.13(2) material should be severed if it is reasonable to do so. **(Orders #24, 48)**

- s.13(2)(a) "factual material" does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separated from the rest of the "advice or recommendations". For example, an appendix of factual information supporting a policy document would be disclosed pursuant to s.13(2)(a). **(Orders # 24, 48, 92, 128, 135, 142, 167)**

- s.13(2)(a) Where no reasonable distinction can be drawn between information considered to be "factual material" and that qualifying as "advice", the exception in s.13(2)(a) is not available. **(Orders #92, 160)**

- s.13(2)(g) mandates the disclosure of a type of record; a study. Where the main purpose of the record is to advise the institution as to the feasibility or plausibility of various proposals, s.13(2)(g) applies. **(Order #206)**

- s.13(2)(i) includes records revealing a discussion of the proposal, institutional support for it and the intention to seek the Ministry's "urgent" approval. **(Order #55)**

- s. 13(2)(j) requires disclosure even if the report contains advice and recommendations. **(Order #168)**

- s. 13(2)(l) applies where the Board of Director's reasons for its final decisions and the advice and recommendations of the committee are in fact one and the same. The final decisions were made during or at the conclusion of the deliberative function. **(Order #201)**

s. 13(3)

- This exception to the exemption for advice or recommendations applies when portions of a record are disclosed by the institution to the media as the basis for making a decision. **(Order #164)**

Law enforcement
14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
(a) interfere with a law enforcement matter;
(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
(c) reveal investigate techniques and procedures currently in use or likely to be used in law enforcement;
(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
(e) endanger the life or physical safety of a law enforcement officer or any other person;
(f) deprive a person of a right to a fair trial or impartial adjudication;
(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
(j) facilitate the escape from custody of a person who is under lawful detention;
(k) jeopardize the security of a centre for lawful detention; or
(l) facilitate the commission of an unlawful act or hamper the control of crime.
Idem
(2) A head may refuse to disclose a record,
(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
(b) that is law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

Refusal to confirm or deny existence of record

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

Exception

(4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

Idem

(5) Subsections (1) and (2) do not apply to record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections. 1987, c. 25, s.14.

See also the s. 2 definition of "law enforcement".

s. 14 (1)

- The disclosure of OPP Criminal Intelligence Records relating to police investigations could be refused under subsections 14(1) or (2). **(Order #106)**

- The "topic" and "background" section of a Minister's briefing response in respect of a murder that occurred within a correctional facility is not exempt under s.14. Regarding s.14(1), no harm could reasonably be expected to result from disclosure. The reasonable expectation must be based on reason and not be fanciful, imaginary or contrived. **(Orders #188, 203, 205, P-211, P-221, P-225)**

- The security related clauses of s.14(1) are not engaged in respect of a record which deals only with the "philosophy" referable to security and nothing else. **(Order #205)**

s. 14(1)(a)

- Investigations into complaints under the Ontario Human Rights Code are "law enforcement matters". Untimely disclosure of records which would identify complainants and respondents and reveal opinions and advice of staff would "interfere with law enforcement matters" and are therefore exempt. **(Orders #89, 178, 208, P-221, P-225, P-258)**

- The disclosure of the contents of wiretap authorization records could reasonably be expected to "interfere with a law enforcement matter" or with an "investigation." **(Orders #195, P-254)**

- The fact that an investigation is on-going is not in itself sufficient to satisfy this exemption. **(Order #P-221)**

s. 14(1)(b)

- Proceedings of a board of inquiry under the Ontario Human Rights Code would constitute a "law enforcement proceeding." Investigations by the Human Rights Commission must be allowed to continue without interference. Such investigations cannot be considered complete until either a board of inquiry has been appointed or the reconsideration process has been completed. Disclosure of records to the public prior to the completion of an investigation could interfere with the investigation. As such, the records are exempt. **(Orders #178, P-253, P-258)**

s. 14(1)(c)

- The successful application of this exemption requires that the disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. If the technique is generally known, reliance on this exemption would not be successful. **(Orders #170, 200)**

s. 14(1)(d)

- There must be evidence of the circumstances in which the information was provided to establish whether it is "confidential". **(Order #139)**

s. 14(1)(f)

- The mere commencement of a legal action is not sufficient to prove that disclosure of records would deprive a person of the right to a fair trial. To rely on this exemption the institution must provide evidence that the disclosure of the records would result in unfairness. **(Orders #48, 126)**

- In order to rely on this exemption the institution must demonstrate the deprivation in a realistic and reasoned fashion. The fact that there is no discovery process before the Crown Employees Grievance Settlement Board and that the disclosure may give the applicant an unfair advantage is not sufficient. **(Order #192)**

s. 14(1)(i)

- Published articles concerning violent acts advocated by animal rights groups was sufficient evidence to establish that the disclosure of records containing information about facilities in which animal research was conducted would endanger security. **(Orders #169, P-252)**

- A request for the floor plans of various government buildings was properly denied under s.14(1)(i). Disclosure of these records could seriously compromise the security of government buildings **(Order #P-217)**

s. 14(1)(j)

- The term "facilitate" means to make easier or less difficult. The exemption applies to records concerning a maximum security institution including: construction plans, drawing for new windows, material to be used in construction such as locks and bars etc. The records in this regard need not be extremely detailed. **(Order #187)**

s 14(1)(k)

- Release of an in-house telephone directory, revealing names and phone numbers of staff and various departments which are not normally available to the public, would jeopardize the security of the mental health centres, which are centres for lawful detention. **(Order #77)**

s. 14(2)

- s. 14(2) deals broadly with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external regulatory activities can carry out their duties. Therefore an internal investigation into program administration within a correctional facility is not "law enforcement". **(Order #98)**

s. 14(2)(a)

Agency

- "Agency" includes organizations acting on behalf of or as agents for law enforcement agencies. Therefore, the Investment Dealers Association is an "agency" because the O.S.C. has informally delegated the investigatory function to it. **(Orders #30, 90)**

- An internal investigation of an employee for breach of contract is done by the O.S.C. as employer, and not as a regulatory agency. In order for the investigation to be characterized as "law enforcement", it must be conducted with a view to providing a court or tribunal with the facts to determine an individual's rights. The fact that the matter could get before a court or tribunal at the instance of the employee is not sufficient. **(Orders #157, 98, 170, 182)**

- Where the Ministry of Correctional Services conducts an investigation into a disturbance at a correctional facility, the resulting report is covered by s.14(2)(a). **(Order #P-250)**

Report

- Complaint processing reports and internal memoranda are "reports" prepared in the course of law enforcement. **(Orders #37, 170)**

- The test in s. 14(2) (a) does not require any evidence that harm would result from the disclosure. If all the record is determined to be a "report", and is within s.14(2)(a), it may be exempt in its entirety. It is unnecessary to sever where the whole report falls within the exemption. **(Orders #30, 38, 94, 124, 134, 137, 200, P-221, P-239, P-250)**

- **All records in the Crown brief may be exempt. This includes witnesses' proposed statements prepared in contemplation of a criminal prosecution. The Act does not affect or interfere with the disclosure procedure existing between the Crown and accused person. (Order #39)**

- **A "report" may include a broad range of documents providing information or opinions which were prepared in the course of law enforcement inspections or investigations. However, a dismissal letter to an employee cannot be considered a "report." Similarly, a notice of hearing documents is not a "report." (Order #170)**

- **A "report" must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. (Orders #200, P-221)**

- **Records reflecting the reconsideration of the Human Rights Commission in respect of holding an inquiry for certain complaints is a "report". (Order # P-253)**

s.14(2)(d)

- **s.14(2)(d) cannot be used to deny access to a requester who is no longer in custody and is is seeking information about himself. (Order #98)**

s.14(3)

- **Orders #102, 106, and 198 provide examples where the head refused to confirm or deny the existence of a record.**

- **In any case where the head refuses to confirm or deny the existence of the record, the discretion must be exercised in accordance with established legal principles. (Orders #106, 170 (at pages 55-56), 195, 199, 213, P-254, P-255)**

- **The fact that the decision under subsection 14(3) is appealed to the Commissioner does not signify to the appellant that the record does exist. The Commissioner will review the type of record sought, and the appellant may argue that the type of record sought ought to be released. (Order #106)**

- **Before the Commissioner discloses the existence of a record to the appellant where it has been determined that no proper foundation exists for claiming the s. 14 exemption, an opportunity will be given to the**

institution to apply for judicial review. In these instances the Order will not go out to the appellant until a number of days stipulated in the order have elapsed. (Order #148)

- This provision is not contrary to the Charter. (Orders #106, P-254)

s. 14(4)

- To determine whether an inspection is "routine", one must review the practice of the agency. The fact that complaints are regularly investigated does not make them "routine". Complaint driven inspections cannot be said to be "routine". (Orders #136, 137)

Relations with other governments
15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,
(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
(b) reveal information received in confidence from another government or its agencies by an institution; or
(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,
and shall not disclose any such record without the prior approval of the Executive Council. 1987, c. 25, s. 15.

General

- A head must apply his or her discretion to each record and cannot rely simply on "practical experience" to exempt a group of records under s.15. (Order #56)

s.15(a)

- A record which discloses the fact that a company will engage in negotiations with the federal government does not relate to intergovernmental relations between the province and the Federal Government. Also, the disclosure of a record containing an undertaking by the province to negotiate with the federal government cannot reasonably be expected to prejudice intergovernmental relations. (Orders #87, 210)

- Disclosure of correspondence between counsel at the Ministry of the Attorney General and the British Lord Chancellor's Department in respect of the Hague Convention on the Civil Aspects of International Child Abduction could reasonably be expected to prejudice inter-governmental relations. (Order #P-236)

- Correspondence between the senior justice officials of two governments which deals with highly sensitive and controversial issues may be exempted under subsection 15(a). (Order #123)

s.15(b)

- Information supplied in confidence by the Federal Health Board is covered by s.15(b). **(Order #68 and see Order #210 for another example)**

- A municipality is not "another government" for the purposes of s. 15(b). **(Order #69)**

- Records prepared by the federal government for the institution in respect of an in-camera federal inquiry are covered by subsection 15(b). **(Order #123)**

- Notes made from manuscripts from an in-camera inquiry fall within s.15(b) when they are provided to a provincial government ministry from the federal government. Similarly, the transcript of a confidential meeting between governments is exempt under s.15(b). **(Orders #123, 124)**

Defence

16. A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council. 1987, c. 25 s.16.

Third party information

17. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute 1987, C.25, s.17(i); 1989, c.71, s.1(1).

Tax information

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

Consent to disclosure

(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure. 1989, c.71, s.1(2).

s.17(1)

- All three parts of the test must be satisfied. (Orders #36, 69, 80, 87, 91, 179, 203, P-241, P-246, P-247, P-248, P-251, P-257)

The First Part of the Test

- Land size is not "scientific, technical, commercial, financial or labour relations information". (Order #87)

Financial Information

- The price paid for land, tax information, conversion rates, default consequences and interest incentives regarding loans are "financial information." (Orders #87, P-251)

- Financial information refers to specific data. (Order #80)

Technical Information

- A consulting engineer's report, indicating structural features of a school, relating to asbestos and fire safety, is "technical information." (Order #3)

- Information regarding boundary negotiations is not "technical information". (Order #69)

- Building size, construction schedule, quality control, production per man hour, and budgets are "technical information." (Order #87)

- The structure of the proposal of a bid, the research design, phasing, study process and costing structure is technical and commercial information. (Order #P-222)

Labour Relations

- Training grant information is "labour relations." (Order #87)

- An investigation of an alleged incident at a child-care centre is not labour relations information. (Order #121)

Commercial Information

- A market research study which investigated the economic feasibility of developing a particular commercial operation is "commercial information". (Orders #41, P-222)

- Any information that would disclose that an application was made for listing a new product in the Drug Formulary constitutes commercial information. (Order #68)

- Records referable to product information regarding pricing and market considerations is "commercial information." (Orders #47, 70, 101, 166 P-246)

- The mailing list of dairy producers is "commercial information". The Ontario Milk Marketing Board (OMMB) is a commercial organization, and the mailing list is a valuable asset in relation to the sale of advertising space in the OMMB's magazine. (Order #76)

- Information regarding the sale of land is "commercial". (Orders #87, P-251)

- Contracts for the purchase of open and secure custody and detention services and programs are "commercial" information. (Order #91)

- The characterization of the information must be derived from the content of the record, rather than from the motives of the requester. Information about government programs, which supports the drawing of inferences about commercial activity that is related to those programs, is not itself "commercial information". (Order #179)

The Second Part of the Test

Supplied

- The term "supplied" must be differentiated from the term "obtained." Inspection reports contain judgments made by government inspectors on what they themselves observed and therefore the information is not "supplied" by the third party. As well, sample answers to a test that were developed by an institution are not "supplied" by a third party. (Orders #16, 53, 122, P-257)

- Information that is possessed by the institution only as a result of the function of the institution under the Municipal Boundary Negotiations Act is not "supplied" by a third party. (Order #69)

- The contractual information was not "supplied" by the affected party as envisioned by s.17 because it was developed as a result of negotiations. Therefore, while certain information was "supplied" in order to enter into the negotiations, the final product, the contract, did not contain the same information and was not "supplied" by the third party. (Orders #87, 179, 203, 204, P-219, P-228, P-241, P-248, P-251)

- It is plausible to interpret s. 17(1) as being applicable to information generated by government which will, if disclosed, permit the drawing of accurate inferences with respect to the nature of confidential commercial information that has been supplied by a third party. As well, s. 17(1) could include information supplied by parties other than the persons opposing disclosure. (Orders #179, 203, P-218, P-219)

- The "supply" part of this test would be satisfied if one could draw accurate inferences from the disclosure about the information actually supplied to the institution. **(Order #203, P-218, P-228, P-246, P-247)**

- Records disclosing amounts paid by an institution to consultants are not "supplied" by the consultants; these payments are determined by the institution. As a result, s.17 is not applicable. **(Order #P-247)**

In Confidence

- Simply asserting that information was supplied "in confidence" is not adequate. There must be evidence produced to support the assertion. Where records were supplied in a "spirit of cooperation", and required to be supplied by law, the confidentiality test was not made out. All three parts of the test must be met before s.17 can be claimed. **(Orders #47, 65, 113, 125, P-257)**

- Information in a report may implicitly be "supplied in confidence", if the report is received in camera and not disclosed to the public. **(Orders #3, 65)**

- Past publication of information puts into question any argument that it was supplied in "confidence". However, the fact that institutions provide information to the Provincial Auditor does not destroy the confidentiality of records, if they were originally supplied in confidence. **(Order #48)**

- Information available to interested parties and the general public before the Act was in force cannot be "supplied in confidence". **(Order #53)**

- Confidentiality must be established by evidence, either in the process, or explicitly, in a contract. A contract that does not specifically state that the institution cannot disclose information does not satisfy the confidentiality requirement. **(Orders #70, 101)**

- Written correspondence which establishes confidentiality satisfies the test. **(Orders #76, P-246)**

- Information that has been made public is not confidential. Land transfer tax information is a matter of public record and is, therefore, not confidential. To be confidential, information must be supplied in confidence and consistently be treated in a confidential manner. **(Orders #87, 113)**

- Material provided as a result of a sealed tender is confidential where the written policy of the institution stipulates that confidentiality (subject to the Act) would be maintained. **(Order #166)**

- A company's efforts to guard the confidentiality of records in other contexts, can support the "in confidence" text. **(Order #P-246)**

- Where records are provided to an institution pursuant to a statutory requirement, they are not, in general, provided in confidence. (Order #P-257)

The Third Part of the Test

Harms

- The institution or a third party must present evidence that is detailed and convincing and must describe a set of facts and circumstances that would lead to a reasonable expectation that harm would occur if the information is released. (Orders #36, 47, 49, 70, 101, 125)

- The onus is on the institution or affected third party to demonstrate that the harm envisioned by the section is present or reasonably foreseeable. (Orders #3, 48, 65, P-249)

- It is unlikely that the disclosure of "standard" clause in a contract could reasonably be expected to result in the types of harms contemplated by s.17. (Order #P-251)

s.17(1)(a)

- The affected third party was able to identify a reasonable expectation that disclosure of the information would result in a significant prejudice to its competitive position. Therefore, the harms test was met. (Orders #47, 113, P-219, P-222, P-246)

- Mere knowledge of an application for a new drug listing could, in itself, result in the type of harm enunciated in s. 17(1). (Order #68)

- Disclosure of the mailing list of producers would cause undue financial loss to the OMMB. There was demonstrable potential for lost advertising revenue for its magazine. Therefore, the harms test was met. (Order #76)

- No harm from disclosure can result where the same information is already available to the public, or has been disclosed. (Order #87)

- The third party must show sufficient information to satisfy the "harms" test. In this case there was no evidence to show that disclosure of this information would harm Toyota's competitive position. Generalized assertions of fact without sufficient evidence do not meet the test. (Order #87)

- The release of monetary amounts noted beside the name of sub-contractors, unit price, alternative price and material variations, all of which are provided in respect of a sealed tender, would prejudice the competitive position of the tenderer if released. However, the harms test is not satisfied in respect of the names of the sub-contractors or the

details of the bid bond, or security deposit. These items would have to be released. (Order #166)

- Release of records revealing steps taken in the development of a product could significantly damage the competitive position of a company where millions of dollars have been invested in research and development of the product. (Order #P-246)

s.17(1)(b)

- s.17(1)(b) does not apply where the information would continue to be supplied because there would be a financial motivation to sell to the institution and to therefore provide the information. (Order #204)

- s.17(1)(b) is not available where the information is supplied pursuant to a contractual obligation and there is no evidence that a breach of the contractual obligation is contemplated or reasonably expected. (Order #P-219)

Economic and other interests of Ontario

18. (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) questions that are to be used in an examination or test for an educational purpose;

(i) submissions under the *Municipal Boundary Negotiations Act*, by a party municipality or other body before the matter to which the submissions relate is resolved under that Act. 1987, c.25, s.18(1); 1989, c.64,s.3(6,7).

Exception

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing. 1987, c. 25, s. 18(2).

s. 18(1)(a)

- Clauses 18(1)(a) and (c) may not be applied when the information is in the public domain through a bona fide publication by the media. (Order #87)

- Records are not exempt under s.18(1)(a) where they contain information concerning the status of litigation which can be discerned easily from publicly available court records. (Order #141)

- Section 18(1)(a) exempts classes or types of records based on content. A technical assessment of the unique design of a structure such as the Skydome falls within the exemption. (Orders #163, 203)

- This provision requires that the information itself have an intrinsic value. For example, it could be said to have monetary value if it is going to be published and sold. (Order #P-219, P-248)

s.18(1)(c)

- Although private sector parties may demand complete confidence in their business dealings with Crown agencies, the institution's economic interests are not necessarily prejudiced by disclosure. (Order #55)

- The release of a list of books provided by teachers to college bookstores could reasonably be expected to prejudice the institution's economic interest and competitive position. (Orders #109, 110)

- The standard of proof regarding this exemption is as stringent as s.17. Here the institution did not provide evidence to suggest that a drop in competitive position would result if the information were released. (Orders #141, 162, 163, 204, P-218, P-248)

- The disclosure of a prose description of financial data is the same as disclosure of actual financial forecasts; both would satisfy the test in s.18(1)(c). (Order #P-248)

s.18(1)(c) and (d)

- The term "could reasonably be expected to" means that the expectation must not be fanciful, imaginary or contrived, but rather based on reason. (Orders #188, 203, P-218, P-229, P-248)

- The fact that the requester is employed by a party who may be opposite in interest to the institution from which the information is sought is not conclusive in establishing a claim for exemption under s.18(1)(c) or (d). **(Order #P-229)**

s. 18(1)(d)

- An institution's belief that it might be sued if the records are released is not sufficient grounds to invoke the exemption in 18(1)(d). **(Order #41)**

- The onus rests on the institution or third party to demonstrate that harms envisioned by the section are present or reasonably foreseeable. **(Orders #48, 55, 70, 141, P-229)**

- The institution must provide evidence to substantiate the submission that release would restrict the ability of the institution to attract bidders in the future. **(Order #101)**

s. 18(1)(e)

- Records revealing the negotiating positions of municipalities, even though in the possession of the Ministry, are not covered by the exemption in 18(1)(e) because municipalities are not "institutions" as defined by the Act. **(Order #69)**

- This exemption cannot be relied upon where the records have been applied to the negotiations. It contemplates on-going or future events. The provision is not wide enough to encompass negotiations that have not commenced or that are not contemplated. **(Orders #87, 141, 154, 163, 204, P-218, P-219)**

s. 18(1)(f)

- This exemption contemplates on-going or future events. **(Order #141)**

- A "plan" is defined as "a formulated and especially detailed method by which a thing is to be done; a design or scheme." A plan to change current practice or to continue current practice is a "plan" within s.18(1)(f). **(Orders #P-229, P-248)**

s. 18 (1)(g)

- This exemption cannot be relied upon where the harm would not result from the disclosure of the records, but rather from the potential misuse of the records on disclosure. **(Order #154)**

- This exemption cannot be relied upon where the records sought are available to the public from the court office where the action is filed. **(Order #162)**

- "Detailed and convincing" evidence must be provided to establish that disclosure of the record could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person. **(Order #163)**

Solicitor-client privilege

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. 1987, c. 25, s. 19.

General

- This exemption covers records subject to the common-law solicitor-client privilege or those records prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. The latter part can apply regardless of whether the common-law privilege applies. All communications of a confidential nature between a client (or his or her agent) and a legal advisor directly related to legal advice (including working papers) are covered by the solicitor-client privilege. **(Orders #39, 49, 52, 56, 57, 68, 116, 126, 135, 136, 137, 141, 143, 150, 158, 160, 163, 170, 191, 192, 200, 210, P-218, P-233, P-235, M-2)**

- A briefing note which summarizes the substance of an opinion given by an institution's legal counsel to an institution employee is privileged. **(Order #135)**

- The second branch of s.19 requires that the record be prepared <u>for use</u> in giving legal advice or in contemplation of litigation. This is a narrower wording than if the statute used the phrase '<u>for the purpose</u>' of giving legal advice. Therefore to rely on s.19 the record itself must be used in giving legal advice. Moreover, "legal advice" generally includes a legal opinion about a legal issue and a recommended course of action based on legal considerations. It does not include information given about a matter with legal implications where there is no recommended course of action based on legal considerations and where no legal opinion is expressed. **(Orders #210, P-236)**

Litigation

- Papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated, are privileged. The potential for litigation must be more than a mere possibility. The privilege also includes material of a non-communicative nature such as notes made in preparation for the litigation to assist the lawyer. **(Orders #49, 52, 56, 68, 123)**

- Private investigators' reports intended for use in litigation are exempt under the litigation privilege branch of the common-law solicitor-client privilege. The invoices from and payments to the private investigators are closely related to their reports and as such are also exempt under s.19. Similarly, a legal account from a lawyer to his or her client reflects

a confidential communication related to legal advice, and is therefore exempt under s.19. (Order #126)

- Records prepared in contemplation of litigation must meet a two-fold test: (1) the dominant purpose must be contemplation of litigation, and (2) there must have been a reasonable prospect of litigation at the time of preparation. (Order #136, 137)

- Regarding the second branch of s.19, a record is prepared in "contemplation of litigation" if:

  (a) the dominant purpose that the record is produced is for litigation, and

  (b) there is a reasonable prospect of litigation at the time of preparation. (Orders # 136, P-236)

- Where Crown Counsel's letter states that the litigation is without merit and that the institution will not be involved, the record is not prepared in contemplation of litigation and s.19 does not apply. (Order #P-236)

Crown Counsel

- Crown counsel includes any person acting in the capacity of legal advisor to an institution covered by the Act. This includes outside counsel retained by the Crown. (Orders #52, 123, 170, P-218)

- The exemption does not apply to records created during an investigation for sexual harassment where they are not prepared by or for Crown counsel. As well, where the records are prepared to fulfill the institution's obligation to investigate in these circumstances, they are not prepared primarily for use in litigation. (Order #165)

Waiver

- Despite the fact that persons other than the solicitor and the client have access to the record, the privilege is not waived unless there is actual evidence of the waiver. (Order #136)

Confidential

- Where the information sought can be obtained from publicly available court records, it is not reflective of a confidential communication between a client and a solicitor. (Order #141)

- Where the appellant has received copies of records to which s.19 is claimed, the exemption does not apply and the records cannot be considered confidential. (Order #163)

Solicitor / Client

- Communications between solicitor and client include those between a solicitor and an Appeal Assistant of the Rent Review Board that acts as agent of the Board member in the review and analysis of a Rent Review Hearings Board file. Where the draft decision of the board was submitted to the Board's legal advisor for advice, it is exempt. (Order #150)

- Where a third party reports that certain legal advice was given by a solicitor to a particular client, the privilege would not attach. However, where the record is the device used to communicate the solicitor's advice to the client, it is covered by s.19. (Order #170 at p. 65)

Communication

- Where records are marked up or annotated by Crown counsel for the purpose of giving advice, the exemption applies. (Orders #170, 150)

- A note saying that a legal memo is attached, or a title page to a legal opinion which contains a distribution list are not subject to s. 19. (Order #200)

Advice

- Where an investigation into wrongdoing is conducted by Crown counsel the fact-finding exercise need not be divorced from the advice given concerning the legal implications of those facts. All of the records are exempt. (Order #170 at p. 68)

- The fact that a lawyer reviewed a record does not in and of itself bring that record within this exemption. (Order #P-227)

Custody or Control

- Records residing with lawyers working as Legal Counsel to an institution are clearly in the custody or control of the institution, regardless of whether the lawyers are employed by the Ministry of the Attorney General. (Order#134)

Danger to safety or health
20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. 1987, c. 25, s. 20.

- Sufficient evidence must be presented to support the application of this exemption. The fact that the records referred to the transfer of an involuntary patient from one institution to another was insufficient. (Order #74)

- The reasonable expectation must not be fanciful, imaginary or contrived. Disclosure of a Minister's briefing response referable to a murder investigation would not trigger s.20 where no witnesses are referred to and where no factual basis has been laid to establish safety concerns. (Order #188)

- While threatening letters written by the appellant may be disclosed to the appellant, the letters also provide evidence of a serious threat that could be used to exempt records not written by the appellant. (Order #P-259)

Personal privacy

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy. 1987, c.25, s.21(1); 1989, c.64, s.3(8).

Criteria re invasion of privacy

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Presumed invasion of privacy

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or education history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution; or

(c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario.

Refusal to confirm or deny existence of record

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record of the record would constitute an unjustified invasion of personal privacy. 1987, c. 25, s. 21(2-5).

s. 21(1)(a)

- Where a person's name appears on a letterhead consent to the disclosure of the letterhead may be implied. (Orders #138, 202)

- Where an individual voluntarily signs a petition, his or her consent to disclosure may be implied. (Orders #154, 171, 172)

- While lottery winners are advised in writing that their identities could be published, and that in order to collect the prize they must agree to this, consent to the routine disclosure of their identities to other individuals by telephone does not exist. Similarly no consent is present in respect of the disclosure of lists of winners to the public on request. This list is not a public record, but is a new record created from records that have been made public. **(Orders #180, 181)**

s. 21(1)(f)

- Where the opinions of individuals have been publicly debated, disclosure of the opinions does not constitute an unjustified invasion of personal privacy. **(Order #66)**

- **Order #149** provides an example of an instance where disclosure of the personal information of persons involved in setting up a Women's Health Clinic was held to be an unjustified invasion of personal privacy. (and see **Order #151**)

- The disclosure of names included in a briefing response to a Minister in respect of a murder investigation in a correctional facility, constitutes an unjustified invasion of the personal privacy of the individuals referred to. **(Order #188)**

- Disclosure of the names of individuals who have been issued hunting licences would be an unjustified invasion of their privacy. **(Order #P-213)**

- Disclosure of the education and employment histories of consultants who were bidding on contracts would unjustifiably invade their privacy. **(Order #P-222)**

s. 21(2)

- In an unusual case, a combination of circumstances might be so compelling as to outweigh a presumption of privacy invasion, but such a case would be extremely rare. **(Orders #20, 43, 61, 97, 99,196, 200, P-242, P-244)**

- Where a requester asserts that he or she needs the records because a complaint to the Human Rights Commission may be made, this assertion alone is not a compelling ground for disclosure. **(Order #97)**

- The disclosure of personal opinions that have been publicly debated does not constitute an invasion of personal privacy. **(Order #66)**

- Names of companies are not personal information. **(Order #16)**

- In an appropriate case, names of requesters can be released. The release of the information must be done in accordance with the Act. Clauses

21(2)(e), (f), and (i) provide for refusal of the requester's name in appropriate circumstances. (Orders #27, 78, P-216)

- Release of a name, address and telephone number of an applicant's agent or contact person may not necessarily constitute an unjustified invasion of personal privacy. (Order #53)
- s.21(2) requires the head to consider all the relevant circumstances. The list in s.21(2) is not exhaustive. The word "including" requires the head to consider circumstances that do not fall under the listed criteria. One of the circumstances could be the restoration of public confidence in the integrity of the Ontario Human Rights Commission. (Orders #99, P-237)

- s.21(2) contains no factors that would lead to the non-disclosure of names on a petition. (Order #171)

- In addition to the factors listed in s.21(2), disclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution. (Order #P-237)

s. 21(2)(a)

- s.21(2)(a) applies to the disclosure of a resume and other background information of an individual in respect of a job competition regarding the position of Director of Policy and Research for the Ontario Human Rights Commission. The desirability of subjecting the institution to public scrutiny and restoring public confidence in the integrity of the institution outweighs any invasion of privacy in the unusual facts of this Appeal. (Order #99)

- The names of police officers investigated and exonerated by the OPP, should be released in this unusual case to allow the public to assess the matter in full. Given the notoriety of the case and the criticism of the officers, the disclosure outweighs the presumption of an unjustified invasion of privacy. (Order #P-237)

- This factor is relevant to the release of a report prepared after an investigation into the alleged misuse of public funds in relation to the submission of expense claims. (Order #P-256)

s.21(2)(d)

- Where disclosure procedures exist outside of this Act, disclosure under this Act is not necessary for a fair determination of rights. (Order #139)

- Although release of a person's name and address may be relevant to a fair determination of another's rights, disclosure must be balanced against the protection of the privacy rights of individuals. (Order #12, P-224)

- Where an allegation of sexual harassment or unprofessional conduct is made, records in respect of the investigation should, in the absence of other factors, be disclosed in order for the employee to fairly determine his or her rights. For an example, or another factor, if the disclosure of witness statements would expose the witnesses to harm, then the records may not be disclosed. **(Orders # 182, 165)**

- Disclosure of records was not relevant to a fair determination of rights where the institution had decided that no repercussions would flow from the complaint. Therefore no rights were at risk. **(Order #P-223)**

s.21(2)(e)

- The release of a list of the identities of individual lottery winners could expose the individuals to pecuniary or other harm and does constitute an unjustified invasion of personal privacy. This is so despite the fact that there is a requirement for a one-time disclosure (by publication) by the Lottery Corporation. **(Order #180, 181)**

s.21(2)(f) and (h)

- The application of these provisions resulted in the non-disclosure of the names of individuals who had reviewed a drug product for the institution during the course of their appointment by order-in-council. The Commissioner was satisfied that these individuals provided their services on a confidential basis and that their identity was sensitive information. **(Order# P-235)**

- The disclosure of the identity of a complainant as well as the identities of those who provided testimony during a private hearing would contravene s.21, given the sensitivity of the information and the fact that is was provided in confidence. **(Order #P-239)**

- The disclosure of a record prepared after an investigation of an employee in respect of the submission of expense claims was not supplied in confidence; nor was it highly sensitive. **(Order #P-256)**

s. 21(2)(g)

- Where there is sufficient reason to question the accuracy or reliability of the records, it may be an unjustified invasion of personal privacy to release it. **(Order #151)**

s.21(2)(i)

- While the release of a report about an employee's submission of expense claims may affect the reputation of the individual, any such damage would not be "unfair". It is fair that institutions establish procedures for expense claims, and that employees follow them. Nevertheless, the names of the individuals referred to in the record (except the individual consenting to release) are severed with the rest of the report released. Clause 21(2)(a) is a factor. **(Order #P-256)**

s. 21(3)

- Section 21(4), 23, and 11 can rebut the presumption in s.21(3). In an unusual case, s.21(2) can as well. (Orders #20, 156, 159, 196, P-233)

s. 21(3)(b)

- This provision cannot be utilized in the balancing of factors in respect of an investigation into an allegation of sexual harassment. Such investigations do not constitute possible violations of law; rather these investigations deal with employment policies and practices. (Orders #165, P-256)

- In order for this provision to apply, criminal proceedings do not have to be commenced. (Order # P-237)

- S.21(3)(b) could apply to the personal information of those being investigated or to those being interviewed in respect of an investigation. An investigation into whether a recipient of Family Benefits is entitled to the monies received is an "investigation into a possible violation of law". Here, the Family Benefits Act would be contravened if unauthorized benefits were received. (Order #P-223)

- This provision does not apply to records generated as part of an investigation as to whether an employee properly filed expense claims. (Order #P-256)

- This provision applies to records created as a result of an investigation into a violation of the Highway Traffic Act. (Order #P-261)

s.21(3)(d)

- The disclosure of the identity of a public servant who has performed a certain task does not constitute a disclosure of employment history. However, the number of hours that an employee worked is employment history. (Orders #170, P-235)

- The disclosure of a person's name and title does not constitute "employment history". (Order # P-216)

- The disclosure of the name of a current employer and the current position of the employee is not employment history. (Order #P-240)

- The disclosure of records relevant to an employee's hours of work, salary and benefits would constitute an unjustified invasion of personal information. (Order #P-244)

- The disclosure of a Hospital Practice Licence of a physician employed by an institution would not result in an unjustified invasion of privacy. This record does not disclose employment history. Given that the information disclosed in the Licence is required to be made a matter of

public record by the College of Physicians and Surgeons, the disclosure would not constitute an unjustified invasion of privacy. (Order #P-244)

- The disclosure of what an individual submitted to an institution as expense claims does not denote employment history. (Order #P-256)

s.21(3)(f)

- It is a presumed invasion of personal privacy to disclose the salaries of named employees. The presumption is not rebutted by s.21(2) or (4) or by the fact that public money is spent on the salaries. (Orders #61, 183, M-5)

s. 21(3)(g)

- Scored typing tests and scored typed letters transcribing shorthand notes of a competition are "personal or personnel evaluations". (Order #43)

- Interview rating sheets and data entry test result sheets are personal evaluations. (Orders #20, 99, P-230)

- Disclosure of information in resumes is an unjustified invasion of personal privacy. (Orders #11, 97)

- This provision raises a presumption concerning recommendations, evaluations, or references about rather than by the identified individual in question. (Order #171)

- This provision does not apply to records generated by an individual who investigated whether an employee filed expense claims in accordance with established policies and procedures. (Order #P-256)

s. 21(4)(a)

- In a situation where each job position has only one incumbent, disclosure of actual salaries would "describe an individual's income". Section 21(4)(a) does not apply to actual salary figures. (Orders #61, M-5)

s.21(4)(a) and (b)

- An employee relationship is established where the "employer" has the right to direct the "employee" in how the work is to be performed, the conditions and hours of work and the results of the work. Another factor includes whether the work is an essential part of the operation of the employer. (Order #P-244)

s.21(5)

- The Commissioner will review the manner in which the institution exercises its discretion to refuse to confirm or deny the existence of a record. Where this discretion is exercised in accordance with established legal principles it will not be interfered with. (Order #213 and See Orders under s.14(3))

Information soon to be published
22. A head may refuse to disclose a record where,
(a) the record or the information contained in the record has been published or is currently available to the public; or
(b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. 1987, c. 25, s. 22.

General

- The head has a discretion to release the record where it has been published, or where it will be made available to the public. (Order #42, 204)

- Although the information requested was to some extent available to the public in Surrogate Court offices, only the Public Trustee has the particular list of names requested. Therefore s. 22 did not apply. (Order #71)

- Section 22 applies where the record is a transcript of court proceedings which could be obtained from the Provincial Court Reporters Office. (Order #123)

s.22(a)

- Whenever a head relies on s.22(a), he or she is obliged to advise the requester where the information can be obtained. (Orders #123, 124, 191, 204)

- The Solicitor General's speech given in the House of Commons is published in Hansard, and as such may be exempt. (Order #124)

- Unreported Divisional Court decisions are available to the public even though a member of the public would have to search through the index of proceedings to locate the desired file. (Orders #159, 191)

- Where the head exercises his or her discretion to not disclose documents that are otherwise available to the public, the head must consider the convenience of the requester compared to the institution. Here, the head abused the discretion provided by the exemption when the head failed to consider this "balance of convenience" test. (Order #170)

- When a head relies on this exemption, he or she has a duty to provide the requester with a description of the records or information in question. **(Orders #191, 204)**

- Section 147(1) of the Courts of Justice Act, 1984 states that anyone is entitled, on payment of a fee, to have access to any document filed in a civil proceeding unless an Act or a court provides otherwise. Therefore, these documents are available to the public and subject to the exemption in s.22(a). **(Order #191)**

- The term "published" means to make known to the people in general. Given the purposes of the Act, a liberal interpretation is warranted. The record must be available to more than just one sector of the public to satisfy s.22(a). **(Order #204)**

s.22(b)

- To rely on s.22(b), the institution should have custody or control of a copy of the record which it is prepared to publish within the requisite time period. **(Order #206)**

Exemptions not to apply
23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. 1987, c. 25, s.23

- The compelling public interest override only applies to the exemptions specifically enumerated in s. 23. **(Orders #1, 123)**

- The section cannot be used by people trying to assert only private interests. **(Order #12)**

- The party asserting the compelling public interest override bears the burden of proof. **(Orders #47,55, 68, 123, 196)**

- Publicly funded organizations (e.g. hospitals) should be open to scrutiny and in an appropriate case s. 23 can be invoked. **(Order #61)**

- In order to invoke the compelling public interest override, there must be a compelling public interest that clearly outweighs the purpose of the exemption, as distinct from the value of disclosure to the requester of the particular record in question. The burden regarding applicability of this section falls on the individual seeking the application. **(Orders # 24, 61, 68, 72, 123, 124, 149, 159, 164, 180, 183, 196)**

- Where extensive public hearings are held as a result of a Royal Commission of Inquiry, the public's interest in the subject matter of the Commission's review has been adequately served such that s.23 would not apply. **(Orders #123, 124)**

- The need for public debate in and of itself is not sufficient to outweigh the purpose of the exemptions. (Order #128)

- While the burden of establishing the applicability of s.23 to particular records is on the appellant, this burden is not absolute. Where the appellant is not familiar with the contents of the records, the Commissioner will review them with a view to deciding whether s.23 applies. (Order #P-241)

ACCESS PROCEDURE

Request
24. (1) A person seeking access to record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
Sufficiency of detail
(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).
Request for continuing access to record
(3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.
Institution to provide schedule
(4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
(a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
(b) a statement that the applicant may ask the Commissioner to review the schedule
Act applies as if new requests were being made
(5) This Act applies as if a new request were being made on each of the dates shown in the schedule. 1987, c.25, s.24

General

- There is no need to clarify a request if the institution knows what is being requested. (Orders #13, P-221)

- Where, after a lengthy search it is determined that no record, as described in the request exists, there is no legal requirement to create a record to answer a request. (Orders #13, 99)

- While there is in general no duty to create a record, it may in certain circumstances be consistent with the spirit and purpose of the Act to do so. The Commissioner, however, has no power to order an institution to create a record where there is no requirement to do so. (Order #99)

- An institution that receives a broadly worded request can (a) respond literally, (b) request further information, (c) unilaterally narrow search and outline the narrowed search to the requester. In some instances narrowing the search will, however require consultation with the requester. **(Orders # 33, 38, 65, 99)**

- Poor record-keeping practices can impede a search to locate records. **(Order #45)**

- Where a request is for information that exists in a format different from that which is asked for, the institution must advise the requester of the existence of the related records. **(Order #50)**

- A request in the form of questions is acceptable when seeking personal information under s. 48(1), but not when seeking general information under s. 24. **(Order #54)**

- Rather than taking a narrow approach to the Act, an institution's coordinator should meet with the requester and offer assistance in reformulating a request so that information that a requester is entitled to can be provided. **(Order #99)**

- The Act does not preclude a requester from submitting the same request more than once. The fact that the institution did not open a new file for the request, is not determinative of whether the request was treated as a separate request. **(Order #202)**

- Where an issue has been raised by the requester regarding the reasonableness of the search, the institution is required to establish this to the satisfaction of the Commissioner. Failing that, the Commissioner may order the institution to search its files in the presence of a Compliance Investigator. **(Order # P-211)**

- It is acceptable for an institution to treat a number of requests as one request when it benefits the requester. However, the requester should be consulted before any decision is made to combine requests for the purpose of conducting a search. **(Order #P-260)**

Continued Access

s.24(3)

- Continued access is predicated on the existence of the record at the time the request is received by the institution. **(Orders #82, 164)**

- The continued access provision does not preserve access for other requesters; only the requester him or herself can take advantage of this provision. As well, continued access is intended to apply to records produced in series and not to records where only one edition is produced. **(Order #164)**

s.24(4)

- The test for frequency of the continuing access request is one of reasonableness. (Orders #107, 108)

s. 24(5)

- The decision to grant access to the original request need not automatically be applied on the subsequent dates in the schedule. (Orders #82, 164)

Request to be forwarded

25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within 15 days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

Transfer of request

(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Greater interest

(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution; or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.

When transferred request deemed made

(4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it. 1987, c. 25, s. 25.

Institution 1989, c. 63

(5) In this section, "institution" includes an institution as defined in section 2 of the Municipal Freedom of Information and Protection of Privacy Act, 1989. ("institution") 1989, c.64, s.3(9).

s. 25(1)

- Section 25(1) imposes mandatory and specific obligations on an institution that must be followed. (Order #58)

- Even when a request is transferred from one institution to another, it is still necessary for the second institution to consider whether another institution

has custody or control of the record before informing the requester that the record does not exist. (Order #59)

- The Commissioner on an appeal may order the institution to forward a request. (Order #119)

Notice by head
26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27 and 28, within thirty days after the request is received,
(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced. 1987, c. 25, s. 26.

- For complex requests a non-binding "interim" section 26 notice should accompany a fee estimate. This interim notice should indicate whether exemptions will likely be applied. (Order #81, P-243)

- Despite the "interim notice" procedure outlined in the Order, the institution was ordered to retrieve all occupational health and safety records involved in the request under appeal, and to make a final decision on access within 60 days. (Order # 81)

- The notice must contain a clear general description of the records responding to the request and a reference to the specific section of the Act being used to exempt each record. The provision of a list of the records that are responsive to a request is consistent with this requirement. The list can consecutively number the records and describe them as "document", "memo", "letter", "notes", etc. (Orders #81, 154)

- The issuance of an interim decision is confined to cases where the record would be unduly expensive for the head to produce in order to make a decision with respect to access to the record. (Orders #184, 185)

- The 30-day time period for responding to a request begins on the date the request is originally received, even though a subsequent phone-call narrowed the request. This "narrowing" does not amount to a "clarification" of the request. (Order # P-214)

Extension of time
27. (1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Notice of extension

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

(a) the length of the extension;

(b) the reason for the extension; and

(c) that the person who made the request may ask the Commissioner to review the extension. 1987, c. 25, s. 27(2).

- The fact that a record is "unduly expensive to produce for inspection" is not grounds for extension of the 30-day deadline. (Order #81)

- The institution may be ordered to respond to the requester without fee where the institution's time extension was clearly unreasonable and where, given the date of the appeal, the time reduction would not be of any real assistance to the appellant. (Order #193)

s.27(1)(a)

- The institution must provide sufficient evidence to the Commissioner to establish in precise terms why the time extension is sought. (Orders #193, 197)

- When assessing the length of the time extension, the institution must make its decision as to the amount of time required within the initial 30-day period prescribed by s.26. (Order #P-234)

s. 27(1)(b)

- An institution cannot claim an extension of time simply because the same requester makes a number of separate requests which collectively involve a large number of records or necessitate consultation. Each request must be considered separately. An institution that is faced with a number of requests that strain its resources may (1) negotiate with the requester who sends in numerous requests to "waive" the 30 day period or to prioritize the requests, or (2) allocate its resources so that when there is the need, additional staff can assist those who routinely work on requests. (Orders #28, 93, 100, 174, 175, 176)

- The intent of the legislation is to allow for an extension of time for consultations with persons external to the institution. (Orders #104, 164, 177, 189, 193)

- While the Freedom of Information and Privacy Branch of Management Board of Cabinet is external to the Ministry of Health and does perform a consultative role, consultations with the Branch can generally be carried out within the statutory 30-day period. Requests for extensions of time must be reasonable. (Order #189)

- In order to ascertain the reasonableness of the request for a time extension, the institution must explain why the consultation will take the amount of time indicated. (Order #190)

- The institution must provide sufficient evidence as to the nature of the consultations and why it is reasonable that the consultations should take the time requested. Consultations must be initiated in a timely fashion. (Orders #193, 197)

- Where an institution intends to issue interim notices, as per Order 81, it cannot rely on s.27. (Order #P-243)

s. 27(2)

- There is a clear obligation on the institution to provide the requester with written notice of an extension after the 30-day period. (Order #72)

Notice to affected person

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

Contents of notice

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27(1), within that extended time limit.

Notice of delay

(4) Where a head gives notice to a person under subsection (1), the head shall also give the person who made the request written notice of delay, setting out,

(a) that the record or part thereof may affect the interests of another party;

(b) that the other party is being given an opportunity to make representations concerning disclosure; and

(c) that the head will within thirty days decide whether or not to disclose the record.

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make

representations to the head as to why the record or the part thereof should not be disclosed.

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

Decision re disclosure

(7) The head shall, within thirty days after the notice under subsection (1) is given, but not before the earlier of,

(a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty----one days after the notice is given,

decide whether or not to disclose the record or part thereof and give written notice of the decision to the person to whom the information relates and the person who made the request.

Notice of head's decision to disclose

(8) Where a head decides to disclose a record or part thereof under subsection (7), the head shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

(b) the person who made the request will be given access to the record or to a part thereof, unless an appeal of the decision is commenced within thirty days after the notice is given.

Access to be given unless affected person appeals

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision. 1987, c. 25, s. 28.

s. 28(1)

- Where the notice has not been provided to third parties, the Commissioner may in an interim Order require the institution to provide notice. (Orders #141, 162, 163)

s. 28(9)

- If third parties do not appeal the disclosure decision to the Commissioner within 30 days, the record must be disclosed. (Order #16)

Contents of notice of refusal

29. (1) Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

(a) where there is no such record,

(i) that there is no such record, and

(ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or

(b) where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,
(iii) the name and position of the person responsible for making the decision, and
(iv) that the person to who made the request may appeal to the Commissioner for a review of the decision. 1987, c.25, s.29(1); 1989, c.64, s.3(11).

Idem

(2) Where a head refuses to confirm or deny the existence of a record as provided in subsection 14(3) (law enforcement) or subsection 21 (5) (unjustified invasion of personal privacy), the head shall state in the notice given under section 26,

(a) that the head refuses to confirm or deny the existence of the record;
(b) the provision of this Act on which the refusal is based;
(c) the name and office of the person responsible for making the decision; and
(d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Idem

(3) Where a head refuses to disclose a record or part thereof under subsection 28(7), the head shall state in the notice given under subsection 28(7),

(a) the specific provision of this Act under which access is refused;
(b) the reason the provision named in clause (a) applies to the record;
(c) the name and office of the person responsible for making the decision to refuse access; and
(d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Deemed refusal

(4) A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given. 1987, c. 25, s. 29 (2-4).

s.29(1)(a)

- This provision applies where the institution does not have custody or control of the record. (Order #119)

s.29(1)(b)

- An institution must be reasonably precise in describing severed records so that the notice of refusal accurately reflects the head's decision. (Order #38)

- It is implicit in s.29(1)(b) that the head provide the requester with a general description of the records responding to the request. The head must also advise the requester of the specific sections or subsections relied upon as exemptions. (Order #81)

s.29(1)(b) (i) and (ii)

- The head is required to provide a requester with the reasons for the application of the exemptions which form the basis for the head's decision to deny access. In the end, the requester should be in the position to make an informed decision as to whether to seek review of the head's decision. **(Orders #158, 187, 189, P-235)**

- Where the institution's notice is deficient because the request is a repetition of a previous request by the appellant, in which access to the records had been granted, it would serve no purpose to require the head to issue a new notice. **(Order #187)**

Copy of record
30. (1) Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.
Access to original record
(2) Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.
Copy of part
(3) Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature. 1987, c.25, s. 30.

General

- When access is provided under the Act, the head has no power (except in respect of research agreements) to impose restrictions on the use of the record. The fact that the requester previously obtained possession of the same record outside of the Act does not affect his or her right to obtain access to the record under the Act. **(Order #164)**

s. 30(2)

- It is not reasonably practicable to provide access to an original record where exempt material has been severed from the record. **(Order #2)**

- Subsection 30(2) does not specifically require an institution to provide requesters with an opportunity to view the record at the location of their choice in the province. The requester's preferred location for viewings may be acceptable if it is reasonably practicable. It is the responsibility of a head to demonstrate that the means of viewing suggested is not reasonably practicable. Undue inconvenience or unreasonable expense as well as the preservation of the security and integrity of the record are important factors. **(Orders #6, 7, 8)**

INFORMATION TO BE PUBLISHED OR AVAILABLE

Publication of information re institutions

31. The responsible minister shall cause to be published annually a compilation listing of all institutions and, in respect of each institution, setting out,

(a) where a request for a record should be made;

(b) the name and office of the head of the institution;

(c) where the material referred to in sections 32, 33, 34, and 45 has been made available; and

(d) whether the institution has a library or reading room which is available for purpose use, and if so, its address. 1987, c. 25, s. 31.

Operation of institutions

32. The responsible minister shall cause to be published annually an indexed compilation containing,

(a) a description of the organization and responsibilities of each institution including details of the programs and functions of each division or branch of each institution;

(b) a list of the general classes or types of records prepared by or in the custody or control of each institution;

(c) the title, business telephone number and business address of the head of each institution; and

(d) any amendment of information referred to in clause (a), (b) or (c) that has been made available in accordance with this section. 1987, c. 25, s. 32.

Institution documents

33. (1) A head shall make available, in the manner described in section 35,

(a) manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by, or are to be guidelines for, any officer who determines,

(i) an application by a person for a right, privilege or benefit which is conferred by the enactment or scheme.

(ii) whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under the enactment or scheme, or

(iii) whether to impose an obligation or liability on a person under the enactment or scheme; or

(b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

Deletions

(2) A head may delete from a document made available under subsection (1) any record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

(a) a statement of the fact that a deletion has been made;

(b) a brief statement of the nature of the record which has been deleted; and

(c) a reference to the provision of this Act on which the head relies. 1987, c. 25, s. 33

Annual report of head

34. (1) A head shall make an annual report, in accordance with subsection (2), to the Commissioner. 1987, c.25, s.34(1)

Contents of report

(2) A report made under subsection (1) shall specify,

(a) the number of requests under this Act for access to records made to the institution;

(b) the number of refusals by the head to disclose a record, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;

(c) the number of uses or purposes for which personal information is disclosed where the use or purpose is not included in the statements of uses and purposes set forth under clauses 45 (d) and (e);

(d) the amount of fees collected by the institution under section 57; and

(e) any other information indicating an effort by the institution to put into practice the purposes of this Act. 1987, c. 25, s. 34(2); 1989, c.64, s.3(12).

Documents made available

35. (1) The responsible minister shall cause the materials described in sections 31, 32 and 45 to be made generally available for inspection and copying by the public and shall cause them to be made available to the public in the reading room, library or office designated by each institution for this purpose.

Idem

(2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose. 1987, c. 25, s. 35.

Information from heads

36. Every head shall provide to the responsible minister at the responsible minister's request, the information needed by the responsible minister to prepare the materials described in sections 31, 32 and 45. 1987, c.25, s. 36.

PART III
PROTECTION OF INDIVIDUAL PRIVACY
COLLECTION AND RETENTION OF PERSONAL INFORMATION

Application of Part

37. This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. 1987, c. 25, s. 37.

Definition

38. (1) In this section and in section 39, "personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act. ("renseignements personnels")

Collection of personal information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. 1987, c. 25, s. 38.

- The Act does not in general require an institution to create a record. Where oral comments of an employer have been relied upon in a job competition, and where these comments have not been "recorded", they

are not personal information as defined in the Act. As a result the oral comments cannot be disclosed to a requester. (Order #17)

Manner of collection

39. (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the *Municipal Freedom of Information and Protection of Privacy Act, 1989*;

(c) the Commissioner has authorized the manner of collection under clause 59(c);

(d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*; R.S.O. 1980, c.89

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;

(g) the information is collected for the purposes of law enforcement; or

(h) another manner of collection is authorized by or under a statute. 1987, c.25, s.39(1); 1989, c.64, s.3(13).

Notice to individual

(2) Where personal information is collected on behalf of an institution, the head shall, unless notice is waived by the responsible minister, inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of a public official who can answer the individual's questions about the collection.

Exception

(3) Subsection (2) does not apply where the head may refuse to disclose the personal information under subsection 14(1) or (2) (law enforcement). 1987, c.25, s.39(2,3)

Retention of personal information

40. (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to who it relates has a reasonable opportunity to obtain access to the personal information.

Standard of accuracy

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date. 1987, c.25, s.40(1,2).

Exception

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes. 1989, c.64, s.3(14).

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. 1989, c.64, s.3(15).

USE AND DISCLOSURE OF PERSONAL INFORMATION

Use of personal information

41. An institution shall not use personal information in its custody or under its control except,

(a) where the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose; or

(c) for a purpose for which the information may be disclosed to the institution under section 42, or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act, c.25, s.41; 1989, c.64, s.3(16).

Where disclosure permitted

42. An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) where disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

(f) where disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

(j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituents behalf or, where the constituent is incapacitated, has been authorized by the next of kin or legal representative of the constituent;

(k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the next-of-kin or legal representative of the employee;

(l) to the responsible minister;

(m) to the Information and Privacy Commissioner; and

(n) to the Government of Canada in order to facilitate the auditing of shared cost programs. 1987, c.25, s.42; 1989 c.64, s.3(17)

Consistent purpose
43. Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41 (b) and 42 (c) only if the individual might reasonably have expected such a use or disclosure. 1987, c. 25, s. 43.

PERSONAL INFORMATION BANKS

Personal information banks
44. A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual. 1987, c. 25, s. 44.

Personal information bank index
45. The responsible minister shall publish at least once each year an index of all personal information banks setting forth, in respect of each personal information bank,

(a) its name and location;
(b) the legal authority for its establishment;
(c) the types of personal information maintained in it;
(d) how the personal information is used on a regular basis;
(e) to whom the personal information is disclosed on a regular basis;
(f) the categories of individuals about whom personal information is maintained; and
(g) the policies and practices applicable to the retention and disposal of the personal information. 1987, c.25, s.45; 1989, c.64, s.3(18).

Inconsistent use or disclosure
46. (1) A head shall attach or link to personal information in a personal information bank,

(a) a record of any use of that personal information for a purpose other than a purpose described in clause 45(d); and
(b) a record of any disclosure of that personal information to a person other than a person described in clause 45(e). 1989, c.64, s.3(19).

Record of use part of personal information
(2) A record retained under subsection (1) forms part of the personal information to which it is attached or linked.

Notice and publication
(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

(a) forthwith notify the responsible minister of the use or disclosure; and
(b) ensure that the use is included in the index. 1987, c. 25, s. 46(2,3).

RIGHT OF INDIVIDUAL TO WHOM PERSONAL INFORMATION RELATES TO ACCESS AND CORRECTION

Right of access to personal information

47. (1) Every individual has a right to access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Right of correction

(2) Every individual who is given access under subsection to (1) to personal information is entitled to,

(a) request correction of the personal information where the individual believes there is an error or omission therein;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. 1987, c. 25, s. 47.

s. 47(2)

- The term "correction" incorporates three elements: the information in issue must be personal and private, the information must be inexact, incomplete or ambiguous and the correction cannot be a substitution of opinion. As a result, when an employee wanted a negative performance review changed this was not done. Where the employer stands by his or her view, a statement of disagreement can be attached to the file. (Order #186)

- Where cogent evidence exists to establish the validity of a correction to attendance records, the institution must correct the records. It is unreasonable for the institution to disregard this evidence on the basis that it is awaiting the decision of an appeal in the matter. (Order #P-232)

Request

48. (1) An individual seeking access to personal information about the individual shall make a request therefor in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

Access procedures

(2) Subsections 10(2) and 24(2) and sections 25, 26, 27, 28 and 29 apply with necessary modifications to a request made under subsection (1).

Manner of access

(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

(a) permit the individual to examine the personal information; or

(b) provide the individual with a copy thereof.

Comprehensible form

(4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used. 1987, c. 25, s. 48.

s. 48(1)

- The requester has an obligation to provide as much direction as possible to an institution in locating records. A request for "all" records may not be sufficiently descriptive for the purposes of the section. **(Orders #33, 34, 35, 44, 45)**

- If an institution narrows its area of search based on its interpretation of the request, the interpretation and narrowed field of search should be communicated to the requester. **(Orders #33, 34)**

- An institution that receives a broadly worded request can (a) respond literally, (b) request clarification, (c) unilaterally narrow the search and outline the limits of the narrowed search to requester. **(Order #38)**

s. 48(3)

- It is up to an institution, on a case-by-case basis, to satisfy itself as to a requester's identity before releasing personal information to the individual. **(Order #29)**

- The institution does not have an unfettered right to decide which method of access the requester may have. The institution must use the same criteria as provided in s.30 when deciding whether to grant the method of access preferred by the requester. **(Order #P-233)**

s. 48(4)

- A head is under no duty to assess whether a requester can comprehend the record. A perception that the requester may not understand the record cannot justify refusal to disclose. **(Order #19)**

- A request in the form of questions is acceptable when seeking personal information, but not when seeking general information. **(Order #54)**

Exemptions

49. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
(d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;
(e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or
(f) that is a research or statistical record. 1987, c. 25, s. 49

s. 49(b)

- In determining if disclosure would constitute an unjustified invasion of another individual's personal privacy, a head must consider all relevant circumstances and need not be restricted to the specific criteria in the Act. (Order #14)

- A balancing test using s.21 (2) and (3) is necessary to determine the degree of disclosure, if any. The degree of disclosure depends on the circumstances of the particular case. The likelihood of employee discipline is one criterion to be used in considering degree of disclosure. (Orders #37, 46, 74, 116, 121, 130, 139, 157, 182, 196)

- In an internal employment related investigation, the names and telephone numbers of other individuals identified in the record were supplied in confidence and would be "sensitive" information. However, the comments of the individuals, in anonymized form, would be disclosed. (Order #157)

- The personal privacy of a complainant and a witness have not been unjustifiably invaded where their recorded statements made during an internal investigation for sexual harassment are disclosed to the individual to whom they relate. In the absence of other factors such as safety or security of the witnesses, the right of the alleged perpetrator to a fair determination of rights is paramount. The timing of the request is also another factor. Witness statements should be recorded fully and accurately and should be shown to the witness for verification before they are relied upon. (Order #182)

s. 49(c)

- All three parts of the test must be satisfied in order to rely on s.49(c). "Evaluative" and "opinion" connote a personal or subjective interpretation of objective facts; for example, test scores, ratings and grades. Reference letters containing only factual material such as employment position dates and reasons for termination are not included. The use to which this personal information is used does not

determine whether it is evaluative or opinion material. The personal information itself must be evaluative or opinion material. (Orders #157, 192, P-238, P-240)

- In order for the exemption to be applicable, the record must be prepared "solely" for the purpose indicated in the Act. As well, the record must be "compiled" by the institution and not simply forwarded to the institution without solicitation. (Orders #192, 194)

s. 49 (d)

- This section does not give the head discretion to disclose a record with an explanation. (Order #19)

s. 49(e)

- Removing the names of individuals who provided information may not be sufficient to protect their identities. (Order #64)

PART IV

APPEAL

Right to appeal
50. (1) A person who has made a request for,
(a) access to a record under subsection 24(1);
(b) access to personal information under subsection 48(1); or
(c) correction of personal information under subsection 47(2),
or a person who is given notice of a request under subsection 28(1) may appeal any decision of ahead under this Act to the Commissioner.
Time for application
(2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with Commissioner written notice of appeal.
Notice of application for appeal
(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal. 1987, c.25, s.50(1-3)
Ombudsman Act not to apply.
(4) The *Ombudsman Act* does not apply in respect of a complaint for which an appeal is provided under this Act or the Municipal Freedom of Information and Protection of Privacy Act, or to the Commissioner or the Commissioner's delegate acting under this Act or the Municipal Freedom of Information and Protection of Privacy Act, c.25, s.50(4); 1989, c.64, s.3(20).

s.50(2)

- The requirement that a requester appeal within 30 days after notice is given by an institution is to be interpreted liberally in favour of access to the process. Where there is no prejudice to the institution, appeals

launched after the 30 day period may be allowed. Each case will be considered on its own facts. (Order #155)

Mediator to try to effect settlement
51. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. 1987, c. 25, s. 51.
Inquiry
52. (1) Where a settlement is not effected under section 51, the Commissioner shall conduct an inquiry to review the head's decision.
Procedure
(2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1).
Inquiry in private
(3) The inquiry may be conducted in private.
Powers of Commissioner
(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.
Record not retained by Commissioner
(5) The Commissioner shall not retain any information obtained from a record under subsection (4).
Examination on site
(6) Despite subsection (4), a head may require that the examination of record by the Commissioner be of the original at its site.
Notice of entry
(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose.
Examination under oath
(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath.
Evidence privileged
(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.
Protection
(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.
Protection under Federal Act
(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

Prosecution

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section.

Representations

(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Right to counsel

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent. 1987, c. 25, s. 52.

s. 52(1)

- In rare circumstances an affected party may be allowed to raise the application of a discretionary exemption to a particular record, even where it is not raised by an institution during the course of an appeal. The affected party cannot, however, rely on the exemption and the Commissioner has no obligation to consider it. **(Order #P-257)**

s. 52(4)

- The Commissioner can inspect any record including those records which are subject to the confidentiality provisions of another statute. **(Order #9)**

s. 52(13)

- Access to representations made to the Commissioner during an appeal cannot be provided as of right. **(Order #78)**

- While the provision states that no person is "entitled" to access to the representations made to the Commissioner, this does not mean that such access is prohibited. The representations of an institution may be disclosed to a requester "in a proper case" where procedural fairness require such a disclosure. However, disclosure of the representations will be ordered only in exceptional cases and only where reference to the record in issue has not been made. **(Orders #164, 207)**

Burden of proof

53. Where a head refuses access to a record or a part of a record, the burden of proof the record or the part falls within one of the specified exemptions in this Act lies upon the head. 1987, c. 25, s.53.

- Where the head refuses access to a record, or a part of a record, the burden of proof that the record or any part thereof falls within an exemption lies upon the head. If a third party appeals the head's

decision to release a record, the onus falls to the third party. (Orders # 3, 49, 65)

Order

54. (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Idem

(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

Terms and conditions

(3) The Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

Notice of order

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50(3) written notice of the order. 1987, c. 25, s. 54.

General

- As long as there is nothing improper or inappropriate in the exercise of a decision-maker's discretion, it should not be interfered with on appeal. (Order #52)

- The introduction by the head of new or different grounds for refusing access to records at the appeal stage will be permitted. It is preferable, however, to set out the grounds in full, prior to an appeal. (Orders #15, 22)

- The institution may be asked to provide an affidavit outlining the steps it took to locate the requested records. (Orders #58, 59)

- The compliance auditor can conduct a review of the correspondence tracking procedures followed in the Minister's office as a result of an appeal. (Order #58)

- In keeping with the policy of the Act, the Commissioner may consider facts that have arisen subsequent to the head's decision. The institution is also free to change a decision in light of subsequent circumstances. All relevant facts must be considered. (Order #67)

- The Commissioner may defer the final determination of an appeal until he or she receives further submissions. (Order #92)

- Where an institution failed to provide representations, the Commissioner may order the institution to respond by affidavit within 20 days. (Order #92)

- The Commissioner may make an interim order. (Order #86)

- In circumstances yet to be fully established, the Commissioner has the jurisdiction to determine a Charter challenge to the Act during an appeal. **(Order #P-254)**

s.54(2) and (3)

- **The Commissioner has the power to order the head to exercise his or her discretion in respect of exemptions. Where the head has not properly considered all the factors, the Commissioner may order the head to reconsider his or her exercise of discretion. Institutions that do not provide the factors that were considered in the exercise of discretion can be ordered to do so. (Orders # 56, 58, 92, 135, 141, 162, 163, 200, 203, 210, P-211, P-220)**

- **Where there was nothing to indicate that the discretion was exercised improperly, the head's decision will not be disturbed on appeal. (Order #154)**

- **Where the head was found to have not exercised the discretion properly, he or she was ordered to reconsider the exercise of the discretion and to provide written reasons. (Orders #170, 195, 199)**

- **Where the head has exercised discretion, the Commissioner will look very carefully at the manner in which it was done to ensure that it was accomplished in accordance with established legal principles. (Order #200, P-241)**

- **The Commissioner has no power to order that an institution create a record where there is no duty to do so. However, it may in certain circumstances be in keeping with the spirit and purpose of the Act for an institution to create a record. (Orders #99, and see #17, #19 and #196)**

- **The Commissioner may order an institution to search its files in the presence of a Commission Compliance Investigator where the search originally conducted was not shown to be reasonable. (Order # P-211)**

Confidentiality
55. (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act. 1987, c.25, s.55(1); 1989, c.64, s.3(21).
Not compellable witness
(2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act. 1987, c.25, s.55(2); 1989, c.64, s.3(22).
Proceedings privileged
(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported

or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act. 1987, c. 25, s. 55(3); 1989, c.64, s.3(23), revised.

Delegation by Commissioner

56. (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation. 1987, c.25, s.56(1).

Exception re records under s. 12 or 14

(2) The Commissioner shall not delegate to a person other than an assistant commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined. 1987, c.25, s. 56(2); 1989, c.64, s.3(24).

PART V

GENERAL

Costs

57. (1) Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

(a) a search charge for every hour of manual search required in excess of two hours to locate a record;

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record; and

(d) shippings costs. 1987, c.25, s.57(1); 1989, c.64, s.3(25).

Exemption, personal information

(2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information. 1989, c.64, s.3(26).

Estimate of costs

(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.

Waiver of payment

(4) A head shall waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety;

(d) any other matter prescribed in the regulations. 1987, c.25, s.57(3); 1989, c.64, s.3(27,28).

Review

(5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee. 1989, c.64, s.3(29)

Disposition of payments
(6) The costs provided in this section shall be paid and distributed in the manner prescribed in the regulations. 1987, c. 25, s. 57(5).

General

- The legislative intention to include a "user pay" principle in the Act is clear. (Orders #6, 67, 111, 184, 185)

s. 57(1)

- If a record is severed, it is appropriate that a requester pay the photocopying costs to view the record. (Order #2)
- The maximum that can be charged for photocopying one page is 20¢ and this includes the employee cost of feeding the machine. (Orders #184, 185, 260)
- Copying charges could be levied where the requester has chosen pages of the original that he or she wishes copied. (Orders #6, 67)
- A head has the discretion to charge or not charge a fee irrespective of the consideration of a fee waiver. (Orders #4, 6, 7, 31, 55) (NB: These Orders were made under the previous wording of this provision)
- The institution's decision to charge costs for shipping within the province in order for the requester to view a record was upheld. If photocopies are required, applicable charges are allowable. The costs of preparing the record are allowable. (Order #67)

s. 57(1)(a)

- Where an institution does not provide the Commissioner with evidence of the details of the search time, the fee charged may be disallowed. (Order #P-248)
- The requester should not be charged a fee for a review of a search conducted by experienced persons. (Order #P-260)

s. 57(1)(b)

- The time spent in making a decision as to the application of an exemption should not be included when calculating fees relating to preparation of a record for disclosure. It is also improper to include time spent for transporting records to a mailroom or arranging a courier service. The clause should be interpreted narrowly. (Orders #4, 105)
- Where only a few severences per page are made, two minutes of preparation time per page is reasonable. (Order #P-260)

s. 57(1)(c) and (d)

- Preparation and shipping charges can be appropriate if the requester seeks access to records at an off-site location. **(Orders #6, 7, 8, 67)**

- The fact that a requester lives outside of the municipality where the records are located should be a relevant factor in the head's exercise of discretion under s.57(1). Shipping charges were appropriate. **(Order #8)**

s. 57(2)

- In view of this recent amendment to the Act, an institution cannot charge a requester for access to personal information, even when the requester had several of the records in his/her possession prior to making the request. **(Order #P-233)**

- Information which only affects the interests of an individual is not personal information where no identifiable information referable to that individual is included in the report. As a result, fees may be charged. **(Order #P-245)**

s. 57(3)

- Fee estimates should be reasonable and, for complex requests, should be based on a representative sampling of records, or on advice of experienced employees knowledgeable about the records. **(Orders #81, 86, 132)**

- Fee estimates should contain a reference to the fee waiver provisions of s. 57(3). **(Orders #81, 86)**

- Issuance of a fee estimate suspends the 30-day count until the deposit is received or fees are waived. **(Orders #81, 86)**

s. 57(4)

- The section is an exhaustive list of the matters to be considered in determining if a waiver is appropriate. **(Orders #5, 10, 31, 43, 55, 81, 111)**

- A fee waiver in the "public interest" is not a criterion for the waiver listed in the section. **(Order #6)**

- Responsibility lies with the requester to provide adequate evidence to support a claim for a fee waiver. **(Orders #4, 10, 111)**

- The requester must raise the matter of a fee waiver. However, request for a waiver need not be explicit. **(Orders #4, 5, 10, 30)**

- The party seeking to require a fee waiver bears the burden of establishing his or her case. By simply providing present and projected earnings, an inmate in a place of detention does not discharge the burden of proof. **(Orders #95, 105, 117)**

s. 57(4)(b)

- In requesting a fee waiver, the requester must provide the institution with information concerning his or her financial position, including assets, income, expenses, etc. **(Orders #105, 184, 185)**

- Non-profit organizations do not automatically qualify for a fee waiver based on financial hardship. **(Order #111)**

s. 57(4)(c)

- This provision is discretionary. Waiver is not required if the record contains some information relating to health or safety matters. **(Order #2)**

Annual report of Commissioner
58. (1) The Commissioner shall make an annual report, in accordance with subsection (2), to the Speaker of the Assembly who shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session. 1989, c.25, s.58(1).
Contents of report
(2) A report made under subsection (1) shall provide a comprehensive review of the effectiveness of this Act and the *Municipal Freedom of Information and Protection of Privacy Act, 1989*, in providing access to information and protection of personal privacy including,
(a) a summary of the nature and ultimate resolutions of appeals carried out under subsection 50(1) of this Act and under subsection 39(1) of the *Municipal Freedom of Information and Protection of Privacy Act, 1989*;
(b) an assessment of the extent to which institutions are complying with this Act and the *Municipal Freedom of Information and Protection of Privacy Act, 1989*; and
(c) the Commissioner's recommendations with respect to the practices of particular institutions and with respect to proposed revisions to this Act, the *Municipal Freedom of Information and Protection of Privacy Act, 1989* and the regulations under them. 1989, c.64, s.3(30).
Powers and duties of Commissioner
59. The Commissioner may,
(a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;
(b) after hearing the head, order an institution to,
(i) cease a collection practice, and
(ii) destroy collection of personal information,
that contravene this Act;
(c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;

(d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
(e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and
(f) receive representations from the public concerning the operation of this Act, 1987, c. 25, s.59.

Regulations

60. The Lieutenant Governor in Council may make regulations,
(a) respecting the procedures for access to original records under section 30;
(b) respecting the procedures for access to personal information under subsection 48(3);
(c) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of "record" for the purposes of this Act;
(d) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions;
(e) setting standards for the accuracy and completeness of personal information that is under the control of an institution;
(f) prescribing time periods for the purposes of subsection 40(1);
(g) prescribing the payment and allocation of fees received under section 57;
(h) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 57;
(i) designating any agency, board, commission, corporation or other body as an institution and designating a head for each such institution;
(j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;
(k) prescribing forms and providing for their use;
(l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act. 1987, c.25, s.60; 1989, c.64, s.3(31).

Offences

61. (1) No person shall,
(a) willfully disclose personal information in contravention of this Act;
(b) willfully maintain a personal information bank that contravenes this Act;
(c) make a request under this Act for access to or correction of personal information under false pretenses;
(d) willfully obstruct the Commissioner in the performance of his or her functions under this Act;
(e) willfully make a a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or
(f) willfully fail to comply with an order of the Commissioner.

Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding $5,000.

Consent of Attorney General

(3) A prosecution shall not be commenced under clause (1) (d), (e) or (f) without the consent of the Attorney General. 1987, c. 25, s. 61.

Delegation of head's powers
62. (1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.
Protection from civil proceeding
(2) No action or other proceeding against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice.
Vicarious liability of Crown preserved R.S.O. 1980, c. 393
(3) Subsection (2) does not by reason of subsections 5 (2) and (4) of the *Proceedings Against the Crown Act* relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject, and the Crown is liable under the Act for any such tort in a like manner as if subsection (2) had not been enacted.
Vicarious liability of certain institutions preserved
(4) Subsection (2) does not relieve an institution of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted. 1987, c. 25, s. 62.

s.62(1)

- A minor defect in the delegation that does not result in any prejudice is not a ground for invalidating a delegation. (Order #P-221)

- A delegation of authority from a previous head continues to be effective even after a new head has taken over. As well, a delegation that does not refer to named individuals is valid. Delegations vest in the holder of the office and not the individuals who may occupy the office at any given time. (Order #P-237, P-244)

Oral requests
63. (1) Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.
Pre-existing access preserved
(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force. 1987, c. 25, s. 63.

s. 63 (2)

- Pre-exising access must be by the public at large. Access to records by the parties to an action does not constitute access by the public at large. (Order #178)

- Even though plans and specifications of a maximum secure facility were readily disclosed prior to the Act coming into force, this section does not operate to require that this practice continue. New procedures put in place for security reasons can operate to limit disclosure. (Orders #187, P-217)

Crown privilege
64. (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
Powers of courts and tribunals
(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. 1987, c. 25, s. 64.

General

- Disclosure of records which are in the custody or control of an institution governed by F.O.I.P.P. (the Act) are governed by the Act. Where there is a conflict between the practice of a tribunal and the Act, the Act prevails. Section 64 supports this view. (Order #53)

Application of Act
65.-- (1) This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution.
Idem
(2) This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the *Mental Health Act*, where the record,
(a) is a clinical record as defined by subsection 35(1) of the *Mental Health Act*; or
(b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.
Idem
(3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding. 1987, c. 25, s. 65.
s.65(2)(a)

- Records contained in a clinical file of a patient in a psychiatric facility are "clinical records". (Order # P-215)

Exercise of rights of deceased, etc., persons
66. Any right or power conferred on an individual by this Act may be exercised,
(a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;
(b) where a committee has been appointed for the individual or where the Public Trustee has become the individual's committee, by the committee; and
(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual. 1987, c. 25, s.66.
Conflict with other Act
67. (1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

(2)The following confidentiality provisions prevail over this Act:
1. Subsection 53(1) of the *Assessment Act.*
2. Subsections 45(8), (9) and (10), 54(4) and (5), 74(5), 75(6), 76(11) and 116(6) and section 165 of the *Child and Family Services Act.*
3. Subsection 77(6) of the *Colleges Collective Bargaining Act.*
4. Section 10 of the *Commodity Futures Act.*
5. Subsection 51(1) of the *Crown Employees Collective Bargaining Act.*
6. Subsection 137(2) of the *Courts of Justice Act.*
7. Subsection 113(1) of the *Labour Relations Act.*
8. Subsection 32(4) of the *Pay Equity Act.*
9. Section 14 of the *Securities Act.*
10. Subsection 4(2) of the *Statistics Act.*
11. Subsection 28(2) of the *Vital Statistics Act.*

s. 67(1)

(NB: Orders number 9 , 15, 18, 21, 23, 25, 26, 32, 42, 51, 54, 62, 63, 83, 84, 88, 92, 96, 114 and 115 were decided under the former wording of s. 67(1) where confidentiality clauses operated as exemptions up until January 1, 1990. They contain the section numbers referable to the pre-R.S.O. 1990 statute.)

- The Commissioner is obliged to determine whether the provision is a "confidentiality provision" and to examine the record to determine whether it falls within the terms of the provision. **(Orders #9, 18, 51, 54)**

Review of this Act
68. The Standing Committee on the Legislative Assembly shall, on or before the 1st day of January, 1991, undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act. 1987, c. 25, s.68.

69. This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force. 1987, c. 25, s. 70.

- This provision recognizes that although different requirements concerning the disclosure of records may have been imposed under earlier legislation, once the Act came into force these records are subject to the Act. **(Order #P-239)**

Crown bound
70. This Act binds the Crown. 1987, c. 25, s. 71.

REGULATIONS

ONTARIO REGULATION 15/89

1. In this Regulation, "Archives" means the Archives of Ontario.
2. An institution may dispose of personal information only by transferring it to the Archives or by destroying it.
3. Where personal information is in the custody or under the control of an institution, no person shall destroy it without the authorization of the head.
4.--(1) Every head shall ensure that all reasonable steps are taken to protect the security and confidentiality of personal information that is to be destroyed, including protecting its security and confidentiality during its storage, transportation, handling and destruction.

(2) Every head shall ensure that all reasonable steps are taken to protect the security and confidentiality of personal information that is to be transferred to the Archives including protecting its security and confidentiality during its storage, transportation and handling.

(3) In determining whether all reasonable steps are taken under subsection (1) or (2), the head shall consider the nature of the personal information to be destroyed or transferred.

5. Every head shall take all reasonable steps to ensure that when personal information is to be destroyed, it is destroyed in such a way that it cannot be reconstructed or retrieved.
6. (1) Every head of an institution shall ensure that the institution maintains a disposal record setting out what personal information has been destroyed or transferred to the Archives and the date of that destruction or transfer.

(2) The head shall ensure that the disposal record maintained under subsection (1) does not contain personal information.

ONTARIO REGULATION 516/90

1. (1) The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions.

(2) The person occupying the position listed in Column 2 of the Schedule opposite to each institution listed in Column 1 is designated as the head of that institution.

2. A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.
3. (1) A head who provides access to an original record must ensure the security of the record.

(2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.

(3) A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.

4. (1) Every head shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected.

(2) Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it.

(3) Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected.

5. (1) Personal information that has been used by an institution shall be retained by the institution for at least one year after use unless the individual to whom the information relates consents to its earlier disposal.

(2) For the purpose of subsection (1), the minimum period of retention of personal information that is contained in a telecommunication logger tape in the custody or under the control of the Ontario Provincial Police is 45 days rather than one year.

6. The following are the fees that shall be charged for the purposed of subsection 57(1) of the Act:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, $10 for each disk.
3. For manually searching for a record after two hours have been spent searching, $7.50 for each fifteen minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, $15 for each fifteen minutes spent by any person.
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

7. (1) If a head gives a person an estimate of an amount payable under the Act and that estimate is $25 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before completing the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

8. The following are prescribed as matter for head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

10. (1) The following are the terms and conditions relating to security and confidentiality that a person is required to agree to before a head may disclose personal information to that person for a research purpose:

1. The person shall use the information only for a research purpose set out in the agreement or for which the person has written authorization from the institution.
2. The person shall name in the agreement any other persons who will be given access to personal information in a form in which the individual to whom it relates can be identified.
3. Before disclosing personal information to other persons under paragraph 2, the person shall enter enter into an agreement with those persons to ensure that they will not disclose it to any other person.
4. The person shall keep the information in a physically secure location to which access is given only to the person and to the persons given access under paragraph 2.
5. The person shall destroy all individual identifiers in the information by the date specified in the agreement.

6. The person shall not contact any individual to whom personal information relates, directly or indirectly, without the prior written authority of institution.

7. The person shall ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.

8. The person shall notify the institution in writing immediately if the person becomes aware that any of the conditions set out in this section have been breached.

(2) An agreement relating to the security and confidentiality of personal information to be disclosed for a research purpose shall be in Form 1.

11. A request for access to a record under Part II of the Act or for access to or correction of personal information under Part III of the Act shall be in Form 2 or in any other written form that specifies that it is a request made under the Act.

12. Ontario Regulation 532/87, Ontario Regulation 601/87, Ontario Regulation 677/87, Ontario Regulation 286/88, Ontario Regulation 436/88, Ontario Regulation 436/88, Ontario Regulation 180/89, Ontario Regulation 270/89, Ontario Regulation 320/89, Ontario Regulating 704/89, Ontario Regulation 332/90 and Ontario Regulation 398/90 are revoked.

13. This Regulation comes into force on the 1st day of January, 1991.

Regulation 516/90

Section 2

- Unreasonable interference"must be decided on a case-by-case basis. It is clear that the section is intended to impose limits on the institution's responsibility to create a new record. **(Order #50)**

Section 6

(NB: These Orders were made under the former section 5 of Regulation 532/87 which was worded differently. As a result, these Orders may no longer be applicable.)

- The institution should consider this amount as a maximum and make an effort to determine the actual cost of photocopying. If the actual cost is less than 20¢/page, the requester should be charged the lesser amount. These charges should not be used as a deterrent or impediment to the utilization of the Act. **(Orders #2, 184, 185)**

- The 20¢ per page fee includes the cost of an employee feeding the machine. **(Orders #184, 185)**

Section 7

- Fee estimates for complex requests should be accompanied by an "interim" notice which indicates the likelihood of obtaining access. The fee estimate must be based on a reasonable understanding of the costs involved in providing access. **(Order #181)**

Section 8

- The purpose of fees is to recover some of the costs of administration and to ensure that those using the Act assume their fair share of costs. **(Orders #2, 6, 7, 8, 31, 81)**

GENERAL

Records Management

- Improvement in records management systems throughout the government is one of the major long-term benefits of the Act. The public has the right to expect that each institution knows what records are in its custody or control and where the records are located so that they can be resolved. Effective records management is absolutely vital for the Archives of Ontario. Accuracy must be ensured. **(Order #59)**

- Institutions should set up logs for incoming mail to ensure that if a requester asks for certain correspondence the institution will be able to find it. **(Order #79, 85)**

Records Retention Procedure

- Clear guidelines are needed regarding records retention schedules. The Commissioner asked the institution to discuss this with the Director of Compliance in order to produce written guidelines regarding the maintenance of personal information banks and retention and disposal of records. **(Orders #35, 45)**

Charter of Rights and Freedoms

- It is "extravagant" to suggest that the amount of fees could operate as a constitutional breach (e.g. breaching the right to "freedom of the press"). **(Orders #4, 5)**

- The discretion of the head to neither confirm or deny the existence of a record in subsection 14(3) is not contrary to the Charter. In circumstances yet to be fully established, the Commission has the jurisdiction to determine a Charter challenge to the Act during an appeal. **(Orders #106, P-254)**

Responding by Courier

- Institutions that send correspondence by courier should be aware that couriers cannot deliver to a post office box. **(Order #79)**

THE MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

R.S.O. 1990, Ch.M.56
and Ontario Regulation 517/90

INDEX

1) SECTIONS 93

2) REGULATIONS 118

SECTIONS

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. 1989, c.63, s.1.

Definitions

2. (1) In this Act,

"head", in respect of an institution, means the individual or body determined to be head under section 3; ("personne responsable")

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner appointed under subsection 4(1) of the Freedom of Information and Protection of Privacy Act; ("Commissaire à l'information et à la protection de la vie privée", "commissaire")

"institution" means,

(a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,

(b) a school board, public utilities commission, hydro- electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the Municipal Act,

(c) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"Minister" means the Chairman of the Management Board of Cabinet; ("ministre")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual; ("banque de renseignements personnels")

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act. ("règlements")

Personal information

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

Bodies considered part of municipal corporation

(3) Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipal corporation for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation. 1989, c.63, s.2.

Designation of head

s.2(1)

Law Enforcement

- By-law enforcement is included in the definition of "law enforcement" clause (b). **(Order #M-4)**

Personal Information

- Where an individual can be identified by the disclosure of the salary paid for a particular job or position, the information is "personal information" (Order #M-5)

3. (1) The members of the council of a municipal corporation may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipal corporation for the purposes of this Act.

Idem

(2) The members elected or appointed to the board, commission or other body that is an institution other than a municipal corporation may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this Act.

If no designation

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipal corporation; and

(b) the members elected or appointed to the board, commission or other body in the case of an institution other than a municipal corporation. 1989, c.63, s.3.

PART I
FREEDOM OF INFORMATION
ACCESS TO RECORDS

Right of access

4. (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

Severability of record

(2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1989, c.63, s.4

Obligation to disclose

5. (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Notice

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so.

Contents of notice

(3) The notice shall contain,

(a) a statement that the head intends to release a record or a part of a ecord that may affect the interests of the person;

(b) a description of the contents of the record or part that relate to the person; and

(c) a statement that if the person makes representations forthwith to the head as to why the record or part should not be disclosed, those representations will be considered by the head.

Representations

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed. 1989, c.63, s.5.

EXEMPTIONS

Draft by-laws, etc.

6. (1) A head may refuse to disclose a record,

(a) that contains a draft of a by-law or a draft of a private bill; or

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

(a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;

(b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public; or

(c) the record is more than twenty years old. 1989, c.63, s.6.

Advice or recommendations

7. (1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator;

(d) an environmental impact statement or similar record;

(e) a report or study on the performance or efficiency of an institution;

(f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;

(g) a report containing the results of field research undertaken before the ormulation of a policy proposal;

(h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;

(i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

(j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if the record is more than twenty years old. 1989, c.63, s.7.

Law enforcement

8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

Idem

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

Refusal to confirm or deny existence of record

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

Exception

(4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

Idem

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections. 1989, c.63, s.8.

S.8(1)(d)

- A complaint form containing the name, telephone number and address of the complainant in respect of a by-law contravention is exempt under this provision because the complainant believed that the information was provided in confidence and the institution's practices and policies supported this. (Order #M-4)

Relations with governments

9. (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

(a) the Government of Canada;
(b) the Government of Ontario or the government of a province or territory in Canada;
(c) the government of a foreign country or state;
(d) an agency of a government referred to in clause (a), (b) or (c); or
(e) an international organization of states or a body of such an organization.

Idem

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure. 1989, c.63, s.9.

Third party information

10. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Consent to disclosure

(2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure. 1989, c.63, s.10.

Economic and other interests

11. A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution if the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) questions that are to be used in an examination or test for an educational purpose;

(i) submissions under the Municipal Boundary Negotiations Act by a party municipality or other body before the matter to which the submissions relate is resolved under that Act. 1989, c.63, s.11.

Solicitor-client privilege

12. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation. 1989, c.63, s.12

- The disclosure of a "final" legal opinion that is subject to solicitor-client privilege does not constitute a waiver in respect of the earlier "draft" legal opinion. The two opinions are separate responses, produced at different times. The second opinion was provided by the solicitor after consultation with his client in respect of the "draft". The earlier "draft" legal opinion is still subject to s.12. (Order #M-2)

Danger to safety or health

13. A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual. 1989, c.63, s.13.

Personal privacy

14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Criteria re invasion of privacy

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Presumed invasion of privacy

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or

(b) discloses financial or other details of a contract for personal services between an individual and an institution.

Refusal to confirm or deny existence of record

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. 1989, c.63, s.14.

s. 14(2)

- The presumption that the disclosure of personal information about victims of crime is an invasion of privacy (s.14(3)(b)) is not rebutted in every case because of the public nature of the criminal justice system. This factor may be valid where there has been an arrest or a trial. **(Order #M-6)**

s.14(3)(b)

- In this case, because there were no other factors available to rebut the presumption, the personal information was not released. **(Order #M-3)**

- A disclosure of personal information to prosecute the violation only occurs after a charge is laid. **(Order #M-6)**

s.14(3)(f)

- Disclosure of the salary for a specific position for which there is one incumbent would be a presumed invasion of privacy. **(Order #M-5)**

s.14(4)(a)

- Given this provision, the legislature recognized the need for the public to have access to some salary information. As a result institutions should try to establish salary ranges that are reasonable. **(Order # M-5)**

Information soon to be published

15. A head may refuse to disclose a record if,

(a) the record or the information contained in the record has been published or is currently available to the public; or

(b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution

within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. 1989, c.63, s.15.

Exemptions not to apply

16. An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. 1989, c.63, s.16.

s. 16

- While there is an element of public interest in the disclosure of personal information of victims of crime, in this case it is not a compelling one. (Order #M-6)

ACCESS PROCEDURE

Request

17. (1) A person seeking access to a record shall make a request for access in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

Sufficiency of detail

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1). 1989, c.63, s.17.

Definition

18. (1) In this section, "institution" includes an institution as defined in section 2 of the Freedom of Information and Protection of Privacy Act.

Request to be forwarded

(2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

Transfer of request

(3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Greater interest

(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution; or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

When transferred request deemed made

(5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it. 1989, c.63, s.18.

Notice by head

19. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20 and 21, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and

(b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced. 1989, c.63, s.19.

Extension of time

20. (1) A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Notice of extension

(2) A head who extends the time limit under subsection (1) shall give the person who made the request written notice of the extension setting out,

(a) the length of the extension;

(b) the reason for the extension; and

(c) that the person who made the request may ask the Commissioner to review the extension. 1989, c.63, s.20.

S.20(1)

- The institution must provide sufficient information to persuade the Commissioner that the number of records and the need for consultation justify the length of the extension claimed. (Order #M-1)

Notice to affected person

21. (1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

Contents of notice

(2) The notice shall contain,

(a) a statement that the head intends to disclose a record or part of a record that may affect the interests of the person;

(b) a description of the contents of the record or part that relate to the person; and

(c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, if there has been an extension of a time limit under subsection 20(1), within that extended time limit.

Notice of delay

(4) A head who gives notice to a person under subsection (1) shall also give the person who made the request written notice of delay, setting out,

(a) that the disclosure of the record or part may affect the interests of another party;

(b) that the other party is being given an opportunity to make representations concerning disclosure; and

(c) that the head will within thirty days decide whether or not to disclose the record.

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

Decision re disclosure

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within thirty days after the notice under subsection (1) is given, but not before the earlier of,

(a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty-one days after the notice is given.

Notice of head's decision to disclose

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

(b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within thirty days after the notice is given.

Access to be given unless affected person appeals

(9) A head who decides under subsection (7) to disclose the record or part shall give the person who made the request access to the record or part within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision. 1989, c.63, s.21.

Contents of notice of refusal

22. (1) Notice of refusal to give access to a record or part under section 19 shall set out,

(a) where there is no such record,

(i) that there is no such record, and

(ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or

(b) where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Idem

(2) A head who refuses to confirm or deny the existence of a record as provided in subsection 8(3) (law enforcement) or subsection 14(5) (unjustified invasion of personal privacy) shall state in the notice given under section 19,

(a) that the head refuses to confirm or deny the existence of the record;

(b) the provision of this Act on which the refusal is based;

(c) the name and office of the person responsible for making the decision; and

(d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Idem

(3) A head who refuses to disclose a record or part under subsection 21(7) shall state in the notice given under subsection 21(7),

(a) the specific provision of this Act under which access is refused;

(b) the reason the provision named in clause (a) applies to the record;

(c) the name and office of the person responsible for making the decision to refuse access; and

(d) that the person who made the request may appeal to the Commissioner for a review of the decision.Deemed refusal

(4) A head who fails to give the notice required under section 19 or subsection 21(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given. 1989, c.63, s.22.

Copy of record

23. (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

Access to original record

(2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

Copy of part

(3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature. 1989, c.63, s.23.

INFORMATION TO BE PUBLISHED OR AVAILABLE

Publication of information re institutions

24. (1) The Minister shall cause to be published a compilation listing all institutions and, in respect of each institution, setting out,

(a) where a request for a record should be made; and

(b) the title of the head of the institution.

Idem

(2) The Minister shall cause the compilation to be published within one year of the coming into force of this Act and at least once every three years thereafter. 1989, c.63, s.24.

Information available for inspection

25. (1) A head shall cause to be made available for inspection and copying by the public information containing,

(a) a description of the organization and responsibilities of the institution;

(b) a list of the general classes or types of records in the custody or control of the institution;

(c) the title, business telephone and business address of the head; and

(d) the address to which a request under this Act should be made.

Idem

(2) The head shall ensure that the information made available is amended as required to ensure its accuracy. 1989, c.63, s.25.

Annual report of head

26. (1) A head shall make an annual report, in accordance with subsection (2), to the Commissioner.

Contents of report

(2) A report made under subsection (1) shall specify,

(a) the number of requests under this Act for access to records made to the institution;

(b) the number of refusals by the head to disclose a record, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;

(c) the number of uses or purposes for which personal information is disclosed if the use or purpose is not included in the statements of uses and purposes set forth under clauses 34(1)(d) and (e);

(d) the amount of fees collected by the institution under section 45; and

(e) any other information indicating an effort by the institution to put into practice the purposes of this Act. 1989, c.63, s.26.

PART II
PROTECTION OF INDIVIDUAL PRIVACY
COLLECTION AND RETENTION OF PERSONAL INFORMATION

Application of Part

27. This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. 1989, c.63, s.27.

Definition

28. (1) In this section and in section 29, "personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act.

Collection of personal information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. 1989, c.63, s.28.

Manner of collection

29. (1) An institution shall collect personal information only directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act;

(c) the Commissioner has authorized the manner of collection under clause 46(c);

(d) the information is in a report from a reporting agency in accordance with the Consumer Reporting Act;

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;

(g) the information is collected for the purpose of law enforcement; or

(h) another manner of collection is authorized by or under a statute.

Notice to individual

(2) If personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

Exception

(3) Subsection (2) does not apply if,

(a) the head may refuse to disclose the personal information under subsection 8(1) or (2) (law enforcement);

(b) the Minister waives the notice; or

(c) the regulations provide that the notice is not required. 1989, c.63, s.29.

Retention of personal information

30. (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.

Standard of accuracy

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

Exception

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes.

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. 1989, c.63, s.30.

USE AND DISCLOSURE OF PERSONAL INFORMATION

Use of personal information

31. An institution shall not use personal information in its custody or under its control except,

(a) if the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose; or

(c) for a purpose for which the information may be disclosed to the institution under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act. 1989, c.63, s.31.

Where disclosure permitted

32. An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part I;

(b) if the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;

(f) if disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

(j) to the Minister;

(k) to the Information and Privacy Commissioner;

(l) to the Government of Canada or the Government of Ontario in order to facilitate the auditing of shared cost programs. 1989, c.63, s.32.

Consistent purpose

33. The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates is a consistent purpose under clauses 31(b) and 32(c) only if the individual might reasonably have expected such a use or disclosure. 1989, c.63, s.33.

PERSONAL INFORMATION BANKS

Personal information bank index

34. (1) A head shall make available for inspection by the public an index of all personal information banks in the custody or under the control of the institution setting forth, in respect of each personal information bank,

(a) its name and location;

(b) the legal authority for its establishment;

(c) the types of personal information maintained in it;

(d) how the personal information is used on a regular basis;

(e) to whom the personal information is disclosed on a regular basis;

(f) the categories of individuals about whom personal information is maintained; and

(g) the policies and practices applicable to the retention and disposal of the personal information.

Ensure accuracy

(2) The head shall ensure that the index is amended as required to ensure its accuracy. 1989, c.63, s.34.

Inconsistent use or disclosure

35. (1) A head shall attach or link to personal information in a personal information bank,

(a) a record of any use of that personal information for a purpose other than a purpose described in clause 34(1)(d); and

(b) a record of any disclosure of that personal information to a person other than a person described in clause 34(1)(e).

Idem

(2) A record of use or disclosure under subsection (1) forms part of the personal information to which it is attached or linked. 1989, c.63, s.35.

RIGHT OF INDIVIDUALS TO WHOM PERSONAL INFORMATION RELATES TO ACCESS AND CORRECTION

Right of access to personal information

36. (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Right of correction

(2) Every individual who is given access under subsection (1) to personal information is entitled to,

(a) request correction of the personal information if the individual believes there is an error or omission;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. 1989, c.63, s.36.

Request

37. (1) An individual seeking access to personal information about the individual shall make a request for access in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

Access procedures

(2) Subsections 4(2) and 17(2) and sections 18, 19, 20, 21, 22 and 23 apply with necessary modifications to a request made under subsection (1).

Comprehensible form

(3) If access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner that indicates the general conditions under which the personal information is stored and used. 1989, c.63, s.37.

Exemptions

38. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

(d) that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual; or

(e) that is a research or statistical record. 1989, c.63, s.38.

PART III
APPEAL
Right to appeal

39. (1) A person may appeal any decision of a head under this Act to the Commissioner if,

(a) the person has made a request for access to a record under subsection 17(1);

(b) the person has made a request for access to personal information under subsection 37(1);

(c) the person has made a request for correction of personal information under subsection 36(2); or

(d) the person is given notice of a request under subsection 21(1).

Time for application

(2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

Notice of application for appeal

(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal. 1989, c.63, s.39.

Mediator to try to effect settlement

40. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. 1989, c.63, s.40.

Inquiry

41. (1) If a settlement is not effected under section 40, the Commissioner shall conduct an inquiry to review the head's decision.

Procedure

(2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1).

Inquiry in private

(3) The inquiry may be conducted in private.

Powers of Commissioner

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts I and II of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

Record not retained by Commissioner

(5) The Commissioner shall not retain any information obtained from a record under subsection (4).

Examination on site

(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site.

Notice of entry

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose.

Examination under oath

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry and, for that purpose, the Commissioner may administer an oath.

Evidence privileged

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

Protection

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

Idem

(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the Canada Evidence Act.

Prosecution

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section.

Representations

(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Right to counsel

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent. 1989, c.63, s.41.

Burden of proof

42. If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. 1989, c.63, s.42.

Order

43. (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Idem

(2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

Conditions

(3) The Commissioner's order may contain any conditions the Commissioner considers appropriate.

Notice of order

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 39(3) written notice of order. 1989, c.63, s.43.

Delegation
44. The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 8 to be produced and examined. 1989, c.63, s.44.

PART IV
GENERAL

Costs
45. (1) If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

(a) a search charge for every hour of manual search required in excess of two hours to locate a record;
(b) the costs of preparing the record for disclosure;
(c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
(d) shipping costs.

Exception, personal information
(2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

Estimate of costs
(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.

Waiver of payment
(4) A head shall waive the payment of all or any part of an amount required to be paid under this Act if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
(b) whether the payment will cause a financial hardship for the person requesting the record;
(c) whether dissemination of the record will benefit public health or safety; and
(d) any other matter prescribed in the regulations.

Review
(5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

Disposition of payments
(6) The costs provided in this section shall be paid and distributed in the manner prescribed by the regulations. 1989, c.63, s.45.

Powers and duties of Commissioner
46. The Commissioner may,

(a) offer comment on the privacy protection implications of proposed programs of institutions;
(b) after hearing the head, order an institution to,
  (i) cease a collection practice that contravenes this Act, and
  (ii) destroy collections of personal information that contravene this Act;

(c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;

(d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and

(f) receive representations from the public concerning the operation of this Act. 1989, c.63, s.46.

Regulations

47. The Lieutenant Governor in Council may make regulations,

(a) respecting the procedures for access to original records under section 23;

(b) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of "record" for the purposes of this Act;

(c) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions;

(d) setting standards for the accuracy and completeness of personal information that is under the control of an institution;

(e) prescribing time periods for the purposes of subsection 30(1);

(f) prescribing the payment and allocation of fees received under section 45;

(g) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 45;

(h) designating any agency, board, commission, corporation or other body as an institution;

(i) prescribing circumstances under which the notice under subsection 29(2) is not required;

(j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;

(k) prescribing forms and providing for their use;

(l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act. 1989, c.63, s.47.

Offences

48. (1) No person shall,

(a) wilfully disclose personal information in contravention of this Act;

(b) wilfully maintain a personal information bank that contravenes this Act;

(c) make a request under this Act for access to or correction of personal information under false pretences;

(d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;

(e) wilfully make a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or

(f) wilfully fail to comply with an order of the Commissioner.

Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding $5,000.

Consent of Attorney General

(3) A prosecution shall not be commenced under clause (1) (d), (e) or (f) without the consent of the Attorney General. 1989, c.63, s.48.

Delegation of head's powers

49. (1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

Protection from civil proceeding

(2) No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice.

Vicarious liability of institutions preserved

(3) Subsection (2) does not relieve an institution from liability in respect of a tort committed by a head or a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted. 1989, c.63, s.49.

Oral requests

50. (1) If a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

Pre-existing access preserved

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by statute, custom or practice immediately before the 1st day of January, 1991. 1989, c.63, s.50.

Information otherwise available

51. (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

Powers of courts and tribunals

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. 1989, c.63, s.51.

Application of Act

52. (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after the 1st day of January, 1991.

Non-application of Act

(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution. 1989, c.63, s.52.

Other Acts

53. (1) This Act prevails over a confidnetiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

Idem

(2) The following confidentiality provisions prevail over this Act:

1. Section 105 of the Municipal Elections Act.
2. Subsection 53(1) of the Assessment Act. 1989, c.63, s.53.

Exercise of rights of deceased, etc., persons

54. Any right or power conferred on an individual by this Act may be exercised,

(a) if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

(b) if a committee has been appointed for the individual or if the Public Trustee has become the individual's committee, by the committee; and

(c) if the individual is less than sixteen years of age, by a person who has lawful custody of the individual. 1989, c.63, s.54.

Review of this Act

55. The Standing Committee on the Legislative Assembly shall, before the 1st day of January, 1994, undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act. 1989, c.63, s.55.

REGULATIONS

ONTARIO REGULATION 517/90

1. A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

2. (1) A head who provides access to an original record must ensure the security of the record.
   (2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.
   (3) A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.

3. (1) Every head shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected.
   (2) Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it.
   (3) Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected.

4. (1) An institution is not required to give notice of the collection of personal information to an individual to whom it relates if the head complies with subsection (2) and if,
      (a) providing notice would frustrate the purpose of the collection;
      (b) providing notice might result in an unjustifiable invasion of another individual's privacy; or
      (c) the collection is for the purpose of determining suitability or eligibility for an award or honour.
   (2) For the purpose of subsection (1), the head shall make available for public inspection a statement describing the purpose of the collection of personal information and the reason that notice has not been given.

5. Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:
   1. For photocopies and computer printouts, 20 cents per page.
   2. For floppy disks, $10 for each disk.
   3. For manually searching for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.

5. For developing a computer program or other method of producing a record from a machined readable record, $15 for each fifteen minutes spent by any person.

6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

7 (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $25 or more, the head may require the person to pay a deposit equal to 50 percent of the estimate before completing the request.

(2) head shall refund any amount paid under subsection (1) that is subsequently waived.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

(1) Whether the person requesting access to the record is given access to it.

(2) If the amount of payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

10. (1) The following are the terms and conditions relating to security and confidentiality that a person is required to agree to before a head may disclose personal information to that person for a research purpose.

1. The person shall use the information only for a research purpose set out in the agreement of for which the person has written authorization from the institution.
2. The person shall name in the agreement any other persons who will be given access to personal information in a form in which the individual to whom it relates can be identified.
3. Before disclosing personal information to other persons under paragraph 2, the person shall enter into an agreement with those persons to ensure that they will not disclose it to any other person.
4. The person shall keep the information in a physically secure location to which access is given only to the person and to the persons given access under paragraph 2.
5. The person shall destroy all individual identifiers in the information by the date specified in the agreement.
6. The person shall not contact any individual to who personal information relates, directly or indirectly, without the prior written authority of the institution.
7. The person shall ensure that no personal information will be used or disclosed in a form in which the individual to whom it

relates can be identified without the written authority of the institution.

8. The person shall notify the institution in writing immediately if the person becomes aware that any of the conditions set out in this section have been breached.

(2) An agreement relating to the security and confidentiality of personal information to be disclosed for a research purpose shall be in Form 1. [The Research Agreement form is shown in Part IV.]

11. A request for access to a record under Part I of the Act or for access to or correction of personal information under Part II of the Act shall be in Form 2 or in any other written form that specifies that it is a request made under the Act. [The Access/Correction Request form is shown in Part IV.]

12. This Regulation comes into force on the 1st day of January, 1991.

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